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No. 22011

In the
United States Court of Appeal
For the Ninth Circuit

JAMES H. MORRISON,	} <i>Appellant,</i>
vs.	
HERBERT V. WALKER,	

Appellee's Brief

FILED

MAY 9 1968

WM. B. LUCK, CLERK

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In the
United States Court of Appeal
For the Ninth Circuit

JAMES H. MORRISON,

Appellant,

vs.

HERBERT V. WALKER,

Appellee.

No. 22011

Appellee's Brief

COMES NOW the appellee HERBERT V. WALKER, Judge of the Superior Court of the State of California for the County of Los Angeles, and presents herewith his brief on appeal:

STATEMENT OF FACTS

Although appellant has a portion of his brief labeled Statement of the Case (pp. 4-6), the said statement is incomplete, argumentative and misleading. Therefore, appellee deems it necessary to set forth the facts herein.

Appellant herein was tried and convicted of a violation of section 26104 (subdivision a) of the California Corporations Code (part of the Corporate Securities

Law) by appellee in the latter's capacity as a judge of the Superior Court of California in 1957. (Superior Court, Los Angeles County case No. 184742) Appellant filed an appeal from this conviction, which was affirmed by the various appellate tribunals. In the California District Court of Appeal, the appellate tribunal specifically upheld the constitutionality of the provision of the California Corporate Securities Law of which appellant was convicted, and upheld the jurisdiction of the Superior Court to try and convict the appellant [*People v. Ben I. Rankin and James H. Morrison*, (1959) 169 C.A. 2d 150, 337 P. 2d 182]. Further petition for hearing in the California Supreme Court was denied on May 20, 1959, and certiorari was denied by the United States Supreme Court in 80 S. Ct. 616 (362 U.S. 905; 4 L. Ed. 2d 556). After completion of the appellate process, the state prison sentence was put into effect in 1960, and appellant completed his prison term in 1965.

On May 10, 1966, appellant filed his original complaint in the present case "in the nature of quo warranto." Appellant's apparent theory was that appellee, Judge Walker, in convicting him had failed to declare the California law in question unconstitutional, and by failing to do so had violated his oath of office and therefore should be ousted from his judicial office. Appellee's motion to dismiss the original complaint was granted with leave to amend. A First Amended Complaint was filed and met a similar fate. A Second

Amended Complaint was filed and met a similar fate. Finally, in January, 1967, appellant filed a Third Amended Complaint seeking merely declaratory relief—in effect, a declaration that appellee, by trying and convicting appellant under California law violated his (appellant's) constitutional rights.

Appellant made a motion to dismiss and motion for summary judgment as to the Third Amended Complaint, pointing out, *inter alia*, that appellant was being sued for his judicial acts, and that, in any event, declaratory relief is not available to determine whether rights heretofore adjudicated were properly adjudicated. This motion was granted, judgment was entered thereon, and appellant prosecutes this appeal from said judgment.

THE ISSUES

1. Is declaratory relief available to a defendant who has been convicted of a crime under state law, failed in his appeal therefrom to the highest court of the land, and served his sentence — to declare that the trial judge violated the federal constitutional rights of the convicted criminal by not declaring the state law unconstitutional?

2. Was there a clear absence of all jurisdiction in appellee when the latter, as a judge of the California Superior Court, tried and convicted appellant of a violation of the California Corporate Securities Law?

ARGUMENT

I

THE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED.

A. THERE WERE NO MATERIAL ISSUES OF FACT REMAINING.

Appellee would agree with appellant, as stated on page 8 of his Opening Brief, that a trial court's function in passing on a motion for summary judgment is to determine whether a genuine issue of fact exists for trial. *Matlack Inc. v. Butler Mfg. Co.* (1966) 253 Fed. Supp. 972. An examination of the record on appeal discloses clearly that, after considering the affidavits in support of, and in opposition to, the motion for summary judgment, absolutely no issue of fact existed.

Appellant argues that issues of fact which did exist included the allegations that:

1) Appellee proceeded to deprive appellant under color of state law of his liberty without due process of law (Brief, p. 8);

2) Appellee found appellant guilty, sentenced him, and thereby enforced a penal enactment repugnant to the Equal Protection Clause of the Fourteenth Amendment (Brief, p. 9).

The only *facts* (as distinguished from conclusions of law) stated in these arguments are that appellee found appellant guilty and sentenced him. But there

is no issue of fact here since Judge Walker, in his affidavit, expressly states that he found James H. Morrison guilty and sentenced him.

The balance of the allegations that appellant relies on as creating issues of fact are sheer conclusions of law: whether appellant was deprived of his liberty under color of state law without due process is clearly a question of law; similarly, whether appellant had enforced against him a penal enactment repugnant to the Equal Protection Clause of the Fourteenth Amendment is a question of law.

There is no genuine issue over the fact that Judge Walker's only contact with appellant was in the Judge's judicial capacity, because appellant states no facts showing any other and non-judicial contacts. If facts stated in the affidavit of the moving party for summary judgment are not contradicted by facts stated in the affidavit of the party opposing the motion, they are admitted. (Local Rule 3, subd. g (3), Rules of the United States District Court, Central District of California). That appellant himself admits he is suing Judge Walker for the latter's judicial act is apparent from appellant's statement of the issue on page 6 of his Opening Brief: "Is a judge immune from suit arising out of his judicial acts. . . ."

Thus, there being no material issue of fact remaining, it is clear that the trial court was justified in granting the motion for summary judgment.

**B. DECLARATORY RELIEF WAS NOT AVAILABLE
TO APPELLANT AS TO ACTS OCCURRING IN
THE PAST.**

The most obvious failure of the allegations of the Third Amended Complaint is that it seeks declaratory relief with reference to a case which is long since *res adjudicata*.

In effect, appellant seeks a declaration from the court that the appellee's judgment, rendered as a judge of the Superior Court of the State of California, violated appellant's rights to due process and equal protection. But the remedy of declaratory relief is not available where no more than an advisory opinion is sought. *Hurst v. United States*, (CCA Okl.) 203 F. 2d 710, cert. den., 98 L. Ed. 1133. In our case the rights of appellant have long since been determined in the criminal case in which he was convicted more than a decade ago; on appeal therefrom, the conviction was affirmed all the way to the highest court of the land. Clearly there is no justiciable controversy remaining; the mere existence on the books of a criminal statute of a state does not of itself present a justiciable controversy. *Hitchcock v. Kloman* (Md.) 76 A. 2d 582.

The primary purpose of the Declaratory Judgment Act was to provide a declaration of rights not yet determined, not to, in effect, second-guess a judicial decision which had already been made. *Clark v. Memolo* (C.A. D.C.) 174 F. 2d 978, 981.

Appellee submits that appellant has not stated any justiciable controversy which could be determined by declaratory relief.

**C. THE SUPPORTING AFFIDAVIT ON THE
MOTION CLEARLY SHOWED THAT JUDGE
WALKER HAD PERSONAL KNOWLEDGE.**

Appellant urges the technicality that the affidavit of Judge Walker in support of the motion for summary judgment did not specifically *state* that Judge Walker was competent to testify to the matters stated therein. But the rule in question, Rule 56(e) Fed. Rules Civ. Proc., merely requires that such affidavits *show* that the affiant is competent to testify thereto.

In subject case, certified copies of the certificates of the County Clerk relating to judicial appointment and election together with the Oath of Office (as judge) subscribed and sworn to by appellee were incorporated as part of the affidavit in question. These, of themselves, clearly and affirmatively showed that Judge Walker was competent to testify as to the subject matter of the affidavit. Even without this, however, the prior complaints in this case (part of the record herein) all alleged that appellee was a judge of the Superior Court. See, e.g., paragraph I of the original Complaint for Quo Warranto, filed in the District Court, May 10, 1966. Finally, it must be ap-

parent from a reading of the affidavit that Judge Walker had personal knowledge of the case in question.

However, even if we were to disregard the affidavit of Judge Walker *in toto*, it is nevertheless apparent that plaintiff could state no claim for declaratory relief as to a transaction that had long since been finally determined by the courts.

II

THERE WAS NO CLEAR ABSENCE OF ALL JURISDICTION IN APPELLEE.

A. JUDGE WALKER WAS ACTING IN A JUDICIAL CAPACITY.

Appellant appears to concede by his statement of the issue on page 6 of the Opening Brief, that the subject of this complaint is a judicial act by Judge Walker.

If there is any question about this fact, however, the court's attention is respectfully called to the affidavit of Judge Walker annexed to the Motion for Summary Judgment, part of the record on appeal herein. It is apparent that Judge Walker is being sued for the trial and conviction of appellant. Judges are immune to suit, however, unless there is a clear absence of all jurisdiction.

Pierson v. Ray, 87 S. Ct. 1213, 18 L. Ed. 2d 288;
Agnew v. Moody, (9th Cir. 1964) 330 F. 2d 868;

Johnson v. MacCoy, (9th Cir. 1960) 278 F. 2d 37;

Larson v. Gibson, (9th Cir. 1959) 267 F. 2d 386;

Herman v. Superior Court, (9th Cir. 1964) 329 F. 2d 154.

In subject case, as noted hereafter, there was not a clear absence of all jurisdiction in appellee.

B. AN OFFENSE UNDER SECTION 26104 CORPORATION CODE WHERE SENTENCE IS TO THE STATE PRISON IS A FELONY WITHIN THE JURISDICTION OF THE SUPERIOR COURT.

Appellant's apparent theory is that since section 26104 Corporation Code does not use the specific term "felony," that, therefore, the crime described could not be a felony and therefore the superior court (in the person of Judge Walker) was without its jurisdiction in trying, convicting and sentencing appellant. (See page 16, Opening Brief.)

But, where a penalty is specifically authorized by statute, the label that the legislature may place on a crime does not determine whether it is a felony or a misdemeanor. The section in question expressly provides that its violation is a public offense punishable, *inter alia*, by imprisonment in the state prison. Section 17 of the Penal Code expressly provides that a felony is a crime which is punishable by death or by imprisonment in the state prison. It is clear, therefore,

that if appellant was sentenced to state prison (as he admits he was) under section 26104 Corporation Code, he was convicted of a felony. Article VI section 5 of the California Constitution (as it existed prior to the 1966 amendments) provided that superior courts had original jurisdiction in all criminal cases amounting to a felony.

The most common definition of the term “jurisdiction” is that it is “the power to hear and determine” the case. *Abelleira v. District Court of Appeal*, (1941) 17 C. 2d 280, 288; 109 Pac. 2d 942. At the very least, where a question is raised as to jurisdiction, the trial court has power to rule on the question of its own jurisdiction. In subject case, appellant is contending that, in spite of the constitutional and statutory provisions cited above, appellee, sitting as a judge of the Superior Court, should have questioned his own jurisdiction on his own motion and should have concluded that he had no jurisdiction. It is readily apparent that no such burden devolves upon a trial court where the law so clearly, as in this case, vests it with jurisdiction to “hear and determine” the case.

Appellant further argues that since section 26104 Corporation Code provides for different alternatives in the way of punishment (fine, jail sentence, prison sentence) that it, therefore, is repugnant to Equal Protection. However, California law has frequently recognized that the judge should be granted certain dis-

cretion as to the quantity or type of punishment to be meted out to a criminal offender such as appellant. In fact since 1872, the Penal Code of California has provided in section 654 thereof:

“An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one. . . .”

In other words so long as a criminal is not punished more than once for the same crime, there is no objection to providing different modes of punishment available to the court in its discretion.

In any event, the jurisdiction of the appellee to try and convict appellant in the subject case was decided finally almost a decade ago and is long since *res adjudicata*. *People v. Rankin and Morrison* (1959) 169 C.A. 2d 150, 337 P. 2d 182; Hearing denied by California Supreme Court, May 20, 1959; certiorari denied by United States Supreme Court in 80 S. Ct. 616 (362 U.S. 905; 4 L. Ed. 2d 556).

III

CONCLUSION

Appellee submits that a review of the record herein discloses that appellee, in his capacity as judge of the Superior Court tried and convicted appellant of violation of a state statute; that there was no clear absence of all jurisdiction in appellee; that appellee is judicially immune to suit in this case; and that, in any event, appellant could not state a cause of action for declaratory relief as to a matter which had already been finally determined by the courts almost a decade ago.

Appellee submits, therefore, that the decision and judgment of the United States District Court should be affirmed in this case.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

and

DONALD K. BYRNE,
Assistant County Counsel
Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD K. BYRNE,
Assistant County Counsel
County of Los Angeles.

No. 22,012

United States Court of Appeals
For the Ninth Circuit

POTRERO HILL COMMUNITY ACTION COM-
MITTEE, an unincorporated association,
MARINE HAMILTON, RUTH FLOWERS, etc.,
et al.,

Appellants,

vs.

THE HOUSING AUTHORITY OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee.

BRIEF FOR APPELLEE

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POTRERO HILL COMMUNITY ACTION COM-
MITTEE, an unincorporated association,
MARINE HAMILTON, RUTH FLOWERS, etc.,
et al.,

Appellants,

vs.

THE HOUSING AUTHORITY OF THE CITY AND
COUNTY OF SAN FRANCISCO,

Appellee.

BRIEF FOR APPELLEE

STATEMENT OF QUESTIONS PRESENTED

I. Does Appellants' complaint state a claim upon which relief may be granted by the Federal District Court?

II. Does this action present a question arising under the laws of the United States or is it in any other way within the jurisdiction of the Federal District Court?

III. Is there a lack of jurisdiction by reason of the amount in controversy being less than \$10,000.00, exclusive of interest and costs?

IV. Are the judgments between the same parties and involving the same property which have been entered by the Municipal Court of the City and County of San Francisco such as to be res judicata as to the Federal District Court?

STATEMENT OF CASE

Appellee does not controvert the Statement of Case presented in Appellants' Brief.

SPECIFICATION OF ERROR RELIED ON

Appellee controverts Appellants' Specification of Error Relied On. Appellee feels that the District Court erred in not granting Appellee's motion to dismiss Appellants' complaint on the ground that said Court lacks jurisdiction over the subject matter herein.

SUMMARY OF ARGUMENT

1. Appellants' complaint fails to state a claim against Appellee upon which relief can be granted by the Federal District Court.

2. The Federal District Court has no jurisdiction over the subject matter for the reason that the action is between parties who are citizens of the same State, and the action presents no question arising under the Constitution or laws of the United States, nor is it otherwise within the jurisdiction of the Federal District Court.

3. The Federal District Court lacks jurisdiction over the subject matter for the reason that the amount in controversy is less than \$10,000.00, exclusive of interest and costs.

4. The Federal District Court lacks jurisdiction over the subject matter for the reason that the Municipal Court of the City and County of San Francisco, State of California, in unlawful detainer actions involving each of the individual Appellants, and regarding the same property, has taken jurisdiction and entered judgments in said actions in favor of Appellee and against each of the individual Appellants, and said judgments have become final.

ARGUMENT

I

APPELLANTS' COMPLAINT FAILS TO STATE A CLAIM AGAINST APPELLEE UPON WHICH RELIEF CAN BE GRANTED BY THE FEDERAL DISTRICT COURT.

The Court below perceptively stated on page 3 of its Opinion:

“The decisive issue before this Court is whether the violations of the sanitation and safety requirements set forth first in the declaration of policy in 42 U.S.C. § 1401 and again in the contract between the Public Housing Administration and the Housing Authority, gives the plaintiffs (Appellants) the right to bring a civil action in the federal courts for injunctive relief.”

Both Appellants and Appellee recognize that the questions of jurisdiction of a federal question and the

failure to allege a claim on which a Federal Court can grant relief, are closely related. Under this part of Appellee's argument, reference will be made only to the argument that Appellants have not stated a claim upon which relief can be granted by the Federal District Court.

In the order of the Court below granting Appellee's motion to dismiss, the Court correctly analyzed the U. S. Housing Act of 1937, as amended, and as contained in 42 U.S.C. §§ 1401-1436. These statutes are the primary basis upon which Appellants urge that a claim has been stated upon which relief can be granted. On page 3 of the Opinion of the Court below, it is accurately stated:

“Nowhere in the Low-Rent Housing Act is there a statute expressly conferring a remedy of this nature for persons in plaintiff's (Appellants') position”.

The Court correctly determined that this is not a case where a civil remedy should be implied, and distinguished this case from those which Appellants cited for that proposition at the time of the hearing on the motion to dismiss and in Appellants' brief herein. The Court below correctly determined that what is to be considered sufficiently safe and sanitary in given situations was an area of discretion left to the Public Housing Administration and that Congress had specifically made the existing standards flexible because of the need for discretion to be exercised.

Appellee heartily concurs with the Court's statement that Appellants' contract rights are adequately

protected by the State cause of action in the State Courts. For this reason, implying a federal remedy giving private persons the right to enforce provisions contained in a declaration of Congressional policy in the Housing Act, is not appropriate in this case, nor is it necessary since under the Federal law the remedy involves the exercise of discretion which is better left to the Public Housing Administration. Appellants herein have an appropriate remedy under the law of the State of California in the event that the Appellee has breached its contract with Appellants. As a matter of fact, Appellants' second cause of action is simply a statement of their claim to relief which would be appropriately theirs if this action had been brought in the State Courts, in the event their factual allegations can be proven.

The California Health and Safety Code, § 34201(c), does provide that the legislative policy is the

“ . . . providing of safe and sanitary dwelling accommodations for persons of low income . . . ”

Section 34212(b) of the same Code provides that the purpose of providing housing projects is,

“To provide decent, safe and sanitary urban or rural dwellings, apartments, or other living accommodations for persons of low income . . . ”.

In Appellants' second cause of action they allege that their contracts with Appellee incorporate by reference these sections. Whether or not this is so, Appellee agrees that those sections are applicable to the dwellings in which Appellants reside. This proves Appellee's point that the Appellants' complaint does

not state a claim upon which the Federal District Court can grant relief, but states a claim upon which relief can and should be granted, if the facts alleged are true, in the Courts of the State of California where the action is between two citizens of that State.

Appellants concede on page 17 of their brief that Appellee correctly pointed out below that the Housing Act declares that the Federal policy is to vest maximum responsibility for the administration of the program in local authority, and in fact declares:

“It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including the responsibility for the establishment of rents, eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this Chapter while effecting economies.” (See 42 U.S.C. § 1401.)

In the many years since passage of this Act, if Congress felt that its purpose was being thwarted, or that a change in this policy could better carry out Congressional intent, it would have provided for a specific remedy of the nature Appellants are attempting to claim, and in fact would have specifically given a person in the position of any of the individual Appellants a right to bring an action in Federal Court to obtain the relief sought by Appellants herein. It is clear that this was not done, and Appellee states emphatically that logic tells us that Congressional intent was that the program could best be carried out by giving the local agencies maximum authority

and by the determination of any legal disputes arising between the Agency and its tenants in the State Courts.

Appellants state the issue as one of determining the propriety of implying a federal cause of action, and although Appellee feels this question is answered by the statements made above, some comment should be made about Appellants' analysis.

Appellants state that the implication of the federal cause of action and the decisions implying such, belong in two general patterns. One is where the defendant has a clearly definable duty subject to a criminal prosecution for its violation, and the second instance is in those cases where in the words of Appellants, a "judicially created federal common law" places a duty upon the defendant with an intention to benefit the plaintiff. Appellants must agree with the Court below in its opinion wherein it distinguished the cases cited involving criminal statutes from the present case which Appellants attempt to bring under their authority because the present case seeks to be brought under the general statement of Congressional policy to assist the states in remedying unsafe and unsanitary housing conditions through the use of public funds under 42 U.S.C. § 1401. The cases cited by Appellants are all cases involving railways (*Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916)), airline cases (*Wills v. TWA*, 200 F.Supp. 360 (1961)), labor cases (*Machinists v. Central Air Lines, Inc.*, 372 U.S. 682 (1963)), and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957)) or cases involving

a violation of the United States Constitution (see *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)).

Appellee agrees with Appellants that cases in these fields do properly present a claim upon which a Federal District Court can grant relief, either because of the specific statute involved, because there is a Constitutional question, or because the nature and effect of Congressional and judicial scrutiny has been to require a policy to make the law national and uniform in all areas and in order to effectuate this uniformity, the Federal Courts must implement any gaps. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

In summary, Appellee does not deny that Appellants, if the facts they allege in their complaint are proven true, have a claim upon which relief may be granted. Appellee's position is that this is not a claim upon which relief may be granted in the Federal District Court, but one upon which relief should be granted in a State Court. All of the arguments made in Appellants' brief have certainly been known to Congress and yet Congress has been unwilling to amend the Act to provide for private civil actions by individuals or groups of individuals residing in housing projects. As a matter of fact, Congress has not amended the Act to provide for such actions because they are satisfied that this program is one which, to be successful, must be locally managed and that any legal problems arising at the local level should be resolved by the State Courts. Appellants each have a contract with Appellee under

which they occupy the premises in which they reside. If this contract has been violated by Appellee either specifically or when read in conjunction with the Health and Safety Code provisions of the State of California referred to herein, Appellants' right of action lies in the State Court for a breach of that agreement or violation of state statute and does not lie in the Federal Courts for a claimed breach of the general purpose clause of a Congressional Act.

II

THE FEDERAL DISTRICT COURT HAS NO JURISDICTION OVER THE SUBJECT MATTER FOR THE REASON THAT THE ACTION IS BETWEEN PARTIES WHO ARE CITIZENS OF THE SAME STATE, AND THE ACTION PRESENTS NO QUESTION ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES, NOR IS OTHERWISE WITHIN THE JURISDICTION OF THE FEDERAL DISTRICT COURT, AND BECAUSE THERE IS NO FEDERAL QUESTION.

Appellee must respectfully differ from the determination of the lower Court that Appellants' complaint should not be dismissed for lack of jurisdiction. Appellee believes the Appellants' action presents no question arising under the Constitution or laws of the United States, nor is it otherwise within the jurisdiction of the Federal District Court. The District Court decision on jurisdiction followed what it viewed to be the approach of *Bell v. Hood*, 327 U.S. 678 (1945), after it determined that Appellant's claim was neither insubstantial nor wholly frivolous. The cases are distinguishable. In the *Bell* case, the plaintiffs sought recovery for a claimed violation of the

Fourth and Fifth Amendments to the United States Constitution. The Court stated, on page 681,

“It cannot be doubted therefore that it was the pleaders’ purpose to make violation of these Constitutional provisions the basis of this suit.”

It is important to note the distinction that in that case recovery was sought for violation of constitutional rights, while in this case there is no constitutional question, but simply a question of whether or not contract provisions have been violated. The Court went on to state an exception to the general rule to be that when a claim under the Constitution or federal statute is immaterial and just for the purpose of obtaining jurisdiction, the general rule is not followed. Appellee points out that certainly something more is required than, as Appellants state on page 5 of their brief:

“In other words, if the plaintiff plainly and seriously asserts he claims a right under federal law, this assertion suffices to establish federal jurisdiction under 28 U.S.C. § 1331.”

Certainly the mere assertion of a right under federal law does not in and of itself grant federal jurisdiction.

In Appellants’ complaint, it is alleged that this is an action arising under federal law and therefore involves a federal question within the purview of 28 U.S.C. § 1331. Jurisdiction is not obtained simply by an assertion of jurisdiction on the part of a plaintiff. It has long been held, although the doctrine has been liberalized, that in “federal question” cases, the Dis-

trict Courts must find their jurisdiction in expressed provisions of federal statute. *Sheldon v. Sill*, 49 U.S. 1441 (1850), and,

“... the jurisdiction of these courts (Federal District Courts) is a limited one and that in every case jurisdiction depends solely upon congressional statute for its existence.” Federal Civil Practice, California Continuing Education of the Bar (1961), page 12.

Federal Courts are still Courts of limited jurisdiction and have jurisdiction only over such matters as Congress has validly conferred upon them. 1 Moore's Federal Practice 602.

“Due regard for the rightful independence of state governments which should activate federal courts requires that they scrupulously limit their own jurisdiction to the precise limits which the statute has defined.” *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

In this case there is no grant of jurisdiction in the Public Housing Act cited by Appellants (42 U.S.C. §§ 1401-1436), and statutes conferring jurisdiction on the Federal Courts must be strictly construed. *Healy v. Ratta*, 292 U.S. 263, 270 (1934). Additionally, in this case there is no grant of federal jurisdiction in the Judicial Code (28 U.S.C. § 1337 through § 1340), nor is there any “federal question” jurisdiction authorized in any statute outside the Judicial Code. The burden of establishing jurisdiction rests on the Appellant as the person who has alleged jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

Appellants claim their action arises under the United States Housing Act, 1937, contained in Chapter VIII of Title 42, U.S.C. § 1401 through § 1436, and therefore an examination of these sections should be made to determine whether they grant any jurisdiction to the Federal District Court over the subject matter herein. Appellants specifically refer to 42 U.S.C. § 1401 which is only a declaration of the policy of Congress. It states that this policy is to assist the states and their political subdivisions to provide housing for families of low income, and provides that it is the policy of the United States to vest in the local housing agencies the *maximum amount of responsibility* for the *administration* of the program. No civil remedies are provided within the Act with regard to occupants of such housing, nor is any Federal District Court jurisdiction conferred. In fact, the Act provides that such housing is to be developed and administered by the state or state agency under the applicable laws of the state. 42 U.S.C. § 1402(11). The Act provides a definition of the term “administration” as it is used in terms of delegating to the local housing authority administration of the program, as meaning “all undertaking necessary for management, operation, maintenance of financing subsequent to physical completion” of such projects. 42 U.S.C. § 1402(6). The Act also provides that any actions by the local public agency administering the housing projects to proceed to recover possession of any housing accommodations operated by it shall be pursuant to state statute and regulation. 42 U.S.C. § 1404(a). It is the contention of the Appellee that the United

States Housing Act of 1937 confers no jurisdiction upon the Federal District Court in an action of the nature brought here and, in fact, clearly states Congressional intent that there is State Court jurisdiction in a matter such as this, not Federal Court jurisdiction.

The claims of Appellants herein are claims which should be made under the laws of the State of California, as alleged in Appellants' second cause of action since they are matters governed by the leases entered into between the Appellants and Appellee. Appellants seem to recognize this fact by their reference to the California Health and Safety Code, §§ 34201 and 34212 in paragraphs XIV and XVIII of their complaint. This case is simply a controversy between tenants and a landlord who happens to be a state agency, and must be governed by state law. Jurisdiction over any controversies exists in the State Courts, not in the Federal District Court.

Only those allegations which are essential and necessary to Appellants' claim should be looked at in determining "federal question" jurisdiction. *Marshall v. Desert Properties Co.*, 103 F. 2d 551 (9th Circuit, 1939). The essential requirement is not that there be a *question* of federal law but that there be a *claim* under federal law. See Mishkin: "The Federal Question in the District Courts", 53 Colum.L.Rev. 157 (1953). The claim of the Appellants in this matter is an attempt to bring an action under a general declaration of policy by Congress. It is not a claim under federal law or even a question under federal

law, but involves the rights of a tenant against a landlord. The federal law by which Appellants seek to confer jurisdiction must be a substantial element of a claim, not indirectly involved, as it is here. *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205 (1934).

A claim must be founded directly upon federal law in order for there to be jurisdiction in a Federal District Court, for the action cannot be regarded as one arising under the laws of the United States where the federal right attempted to be asserted is actually of incidental or collateral relationship only, or even if direct, if it is clearly not possible for it to be substantially affected by the results of litigation. *Mudd v. Teague*, 220 F. 2d 162 (1955).

Appellants cite the case of *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180 (1921) as formulating the jurisdictional standard in terms of whether the complaint raises issues which depend for their outcome upon construction of federal law. In that case there was no question of jurisdiction raised by the parties, but in any event, Appellee believes the key word in the above statement is “*depend*”. As previously stated, the state law provides an adequate remedy between two citizens of the same state, and therefore in the present case, the outcome sought by Appellants does not “*depend*” upon construction of the federal law. In the *Smith* case, as in other cases previously referred to, the factual situation involves a question of the constitutionality of an act of Congress, which is not present in this case.

In order for there to be jurisdiction, the suit must arise under the law of the United States, and a suit arises under the law that creates the cause of action. See *American Well Works Co. v. Layne and Boler Co.*, 241 U.S. 257, 260 (1916). That is not true here.

Appellants raise what they call substantial issues of federal law, but Appellee feels that this is an incorrect characterization. Under the same reasoning, all disputes between tenants and housing authorities would be brought within the jurisdiction of the Federal Courts. Is the Federal District Court to be the judge of allegations by tenants that too much or too little heat is provided, that buildings should be painted every three years rather than every five or ten, that refrigerators or stoves are to be of one size or another? Appellee does not believe so.

Under Appellants' line of reasoning, any suits for eviction should be brought in Federal Court but, as previously stated, the Housing Act specifically provides that they are to be brought in State Courts and provides that maximum power of administration is given to the local agencies. By reading the Act, one must conclude that Congress did not intend the Federal District Court to have jurisdiction over disputes between tenants and local agencies, but intended these differences to be resolved at the local level in the local State Courts.

Appellants contend that their claim is analogous to the claim put forth in *Machinists v. Central Air Lines*, 372 U.S. 672 (1963). Appellee sees no analogy

between the cases. The case cited by Appellants is one in which the Supreme Court said that the contract was to be viewed as part of the statutory scheme of the Railway Labor Act and the Court's interpretation had to be a matter of federal law because the rights and duties were created by federal law and federal law created the cause of action. As previously stated in this brief, this case involved that area of activity such as interstate commerce matters or labor law regulation which requires uniform national law enforcement as to validity, interpretation and enforcement. The subject matter calls for uniformity. Despite Appellants' contentions, this is not true in the public housing cases, for Congress has stated in the Act that maximum authority is granted to the local agency in the administration of the housing projects. As the lower Court indicated in its opinion, there is a substantial area of discretion appropriately left to the Public Housing Administration and to the local Authority and any remedy sought under the Housing Act would involve judicial infringement upon a proper Congressional delegation of discretion to the Public Housing Administration and to the local agency in order to implement Congressional intent in this program. As stated by the lower Court on page 6 of its opinion,

“ . . . plaintiff's contract rights are adequately protected by any existing state cause of action in the state courts.”

Appellee contends that the Federal District Court has no jurisdiction over the subject matter herein, and

it almost requires no citation of authority to state that a Federal Court with no jurisdiction over the subject matter is without power or authority to proceed and must dismiss plaintiff's complaint. *Jackson v. Kuhn*, 254 F. 2d 555 (1958). It is fundamental that the lack of jurisdiction over the subject matter cannot be waived nor can it be created by stipulation and that without jurisdiction over the subject matter, the Court must dismiss the complaint. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940).

III

THE FEDERAL DISTRICT COURT LACKS JURISDICTION OVER THE SUBJECT MATTER FOR THE REASON THAT THE AMOUNT IN CONTROVERSY IS LESS THAN \$10,000.00, EXCLUSIVE OF INTEREST AND COSTS.

The Court below reached a decision that the complaint should be dismissed for failure to state a claim upon which relief can be granted and therefore did not reach this argument raised by Appellee. Nevertheless, Appellee seriously contends that this ground is sufficient independent reason for granting Appellee's motion to dismiss Appellants' complaint. It is elementary that in actions alleged to arise under federal law, the amount of controversy must exceed the sum or value of \$10,000.00, exclusive of interest and costs. 28 U.S.C. § 1131(a).

The matter in controversy in this case, even if Appellants were allowed to aggregate their claims, does not put into controversy an amount exceeding the

\$10,000.00 minimum. In any event and more importantly, Appellee contends that Appellants are not permitted under the law to aggregate their claims. Appellant contends that the 1966 revision to Rule 23, F.R.C.P. did away with the distinction between “true” and “spurious” actions, and that there is now only one class action based upon the requirement that the class be numerous, that common issues be presented, that the claims of the representatives be typical and that the representatives will protect the interests of the class. Appellee agrees that the former distinctions have been modified and that Appellants correctly state the revision to Rule 23. However, Appellee disagrees with Appellants’ contention that it is reasonable to assume that said revision was intended to entirely eliminate the distinction between true and spurious class actions for purposes of aggregating claims to reach jurisdictional requirements. There is no statement in the revision to that Rule which does away with the difference for the purpose of aggregation of claims. The revision may have the effect of eliminating any distinction as to subject matter or common position, but not as to the amount in controversy. A review of the notes of the Advisory Committee on Rules following Rule 23, does not indicate that there is any change with regard to the rule not allowing aggregation of claims in a case such as this for purposes of reaching the required amount in controversy.

There is also nothing in the revision to Rule 23 which in any way overrules previous cases referring

to this point. Research by Appellee has resulted in the finding of two cases which are very similar on their facts to the case presently before the Court in this matter. In *Koster v. Turchi*, 173 F. 2d 605 (1949) tenants of a housing project, on behalf of themselves and some three hundred others, contested rent increases of more than \$250.00 a year apiece, on the ground they were deprived of due process. The Court held that the increases of rentals of each tenant were separate causes of action and could not be joined to produce the jurisdictional amount.

In *Miller v. Woods*, 185 F. 2d 499 (1950), a group of tenants in housing projects in Los Angeles sued the Housing Expediter to enjoin him from terminating federal rent control in Los Angeles. The Federal District Court in that matter dismissed the complaint for lack of jurisdiction of the subject matter and for failure to state a claim. On appeal, it was held that the jurisdictional amount was not present and that the claims could not be aggregated to confer jurisdiction on the Court.

In the present case, the Court has no jurisdiction over the subject matter herein, because the amount in controversy is insufficient.

IV

THE FEDERAL DISTRICT COURT LACKS JURISDICTION OVER THE SUBJECT MATTER FOR THE REASON THAT THE MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, IN UNLAWFUL DETAINER ACTIONS INVOLVING EACH OF THE INDIVIDUAL APPELLANTS, AND REGARDING THE SAME PROPERTY, HAS TAKEN JURISDICTION AND ENTERED JUDGMENTS IN SAID ACTIONS IN FAVOR OF APPELLEE AND AGAINST EACH OF THE INDIVIDUAL APPELLANTS AND SAID JUDGMENTS HAVE BECOME FINAL.

It has long been held that a judgment between the same parties and regarding the same property which is obtained in a State Court is *res judicata* as to a Federal Court. *McClellan v. Carland*, 217 U.S. 268 (1910). The Court below by reason of the basis upon which it reached its decision, did not consider the ground of Appellee's motion that there was a lack of jurisdiction because of the pending actions over which the Municipal Court of the City and County of San Francisco, State of California, had obtained jurisdiction. Appellee acknowledges that such a motion to dismiss by reason of pendency of similar actions in a state is addressed to the discretion of the District Court, which should consider whether the other suits pending will necessarily determine the controversy between the parties. See *Highway Insurance Underwriters v. Nickols*, 85 F. Supp. 527 (1949).

Appellants claim that unlawful detainer actions filed in a Municipal Court are not *res judicata* because *res judicata* only operates to bar relitigation of a single cause of action. They further state that under California State Law, unlawful detainer is a

summary possessory action which is very limited as to the issues which may be litigated. It is submitted by Appellee that the appropriate remedy for the Appellants, when an unlawful detainer judgment was obtained against them, was to appeal said judgment to the highest Court of the State and thence, if the judgments were sustained against the claims raised in this action, to apply to the U. S. Supreme Court. This is the process which was followed in an identical action in *Thorpe v. Housing Authority of the City of Durham*, 87 S.Ct. 1244 (1967). It is submitted that Appellants herein could have asserted the rights they are raising in this action and since they had the opportunity to raise those rights in the State Court action, and did not do so, they are unable to raise them now.

For the information of the Court, each of the individual Appellants herein has had a final judgment rendered against him in the Municipal Court of the City and County of San Francisco, State of California and in favor of Appellee for unlawful detainer.

CONCLUSION

For the above reasons the Court should sustain the District Court's order to dismiss Appellants' complaint, both on the ground that there is a failure to state a claim upon which relief can be granted, the ground stated by the Court and in addition, because the Federal District Court lacks jurisdiction over the subject matter.

Dated, San Francisco, California,
October 16, 1967.

DONALD B. KING,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD B. KING,
Attorney for Appellee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

220/3-4700

LEON W. SCALES and KATHLEEN A. SCALES,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

ALLEN J. SUTHERLAND and ESTELLA W. SUTHERLAND,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

A. PAUL SUTHERLAND and MARLEINE G. SUTHERLAND,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

MONA J. MASON (FORMERLY MONA J. PARKER),
Plaintiff

v.

ROBERT A. RIDDELL,
Defendant-Appellant

JOSEPH LEVIKOW, JR. and ELIZABETH M. LEVIKOW,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

FILED

AUG 12 1968

FRED J. HOWARTH and PAULINE J. HOWARTH,
Plaintiffs

v.

ROBERT A. RIDDELL,
Defendant-Appellant

WM. B. LUCK, CLERK

ON APPEALS FROM THE JUDGMENTS OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,013

LEON W. SCALES and KATHLEEN A. SCALES, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,014

ALLEN J. SUTHERLAND and ESTELLA W. SUTHERLAND, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,015

A. PAUL SUTHERLAND and MARLEINE G. SUTHERLAND, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,016

MONA J. MASON (formerly MONA J. PARKER), Plaintiff v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,017

JOSEPH LEVIKOW, JR. and ELIZABETH M. LEVIKOW, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

No. 22,018

FRED J. HOWARTH and PAULINE J. HOWARTH, Plaintiffs v.
ROBERT A. RIDDELL, Defendant-Appellant

ON APPEALS FROM THE JUDGMENTS OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUES PRESENTED

1. Whether the gain derived by the taxpayers from payment
and discharge of the two promissory notes held in trust for their
benefit was taxable as ordinary income as the Government contended.
2. Whether the gain derived by the taxpayers from their
profit interest in the Kearney Park land, a part of which was sold
to the Navy and a part distributed to the taxpayers, was taxable
ordinary income.

STATEMENT OF THE CASE

The appeals in these six consolidated cases involve refund of income taxes for the calendar year 1958 in the respective amounts of \$5,041.59, \$41,116.34, \$20,313.17, \$4,120.25, \$3,067.89 and \$75,001.85. (Nos. 22,013-22,018, R. 4.)

The taxes, with interest thereon, were paid, on March 23, 1964, and claims for refund of the taxes, with interest, were filed on April 6, 1964. (R. 9.) After more than six months had elapsed from the time the claims were filed or on February 17, 1965, suits were commenced in the lower court. (R. 8.)

The notices of appeal by the Government were filed on April 15, 1966, written sixty days after the entry on February 17, 1966 of summary judgments by the court below in favor of the taxpayers. (R. 169, 183-184.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

The facts as found by the District Court necessary for resolution of these six consolidated cases may be briefly stated as follows (No. 22,013, R. 94-120):

The Kearney Park Development Corporation (Kearney Park) and Union Title and Trust Company of San Diego (Union), as trustees under its Trust R-13357, entered into an agreement, under the date of April 9, 1953, for the sale of certain vacant real property (Kearney Mesa property), in the Kearney Mesa area of San Diego, California. Pursuant to that agreement, Union conveyed to Kearney Park the real property covered by the sales agreement, and in consideration received promissory notes (Kearney Park notes) dated June 4, 1953, in the

respective amounts of \$80,000 and \$553,750. Each note was secured by a portion of the Kearney Mesa property conveyed. The deed of trust securing the \$80,000 note covered approximately 220 acres, and the deed of trust securing the \$553,750 note covered an area of 360 acres. (R. 94.^{1/})

The Kearney Mesa property was subject to a prior lien of certain improvement bonds (sewer and water improvements) issued by the Kearney Mesa Improvement District in the approximate amount of \$224,000. (R. 94-95.) The improvement bonds (each of which covered a specific parcel of land described by metes and bounds) were 10-year bonds, payable in equal annual installments of principal and semi-annual installments of interest beginning January 2, 1955. (R. 95.)

The Kearney Park notes, dated June 4, 1953, generally provided for periodic payments of principal and interest. The \$80,000 note provided for the payment of the principal sum on or before three years from the date, with interest at the rate of five percent per annum on any unpaid balance from and after two years from date of issue. The \$553,750 note provided for payment of three annual installments of \$54,750, payment commencing two years after the date of the note, with interest at the rate of five percent per annum, and the balance of the principal payable, with interest, on or before five years from the date of the note. Both notes provided that upon a default in the payment of interest, the principal and interest would be immediately due and payable at the option of the holder of the notes. (R. 95-96.)

"R." references are to the record on appeal in No. 22,013 unless otherwise designated. The facts as stated in No. 22,013 are those involved in the other five consolidated cases on appeal.

In 1955, the principal and interest payments on the Kearney Park
tes were in default, and improvement bonds and property taxes were
linquent. The notes were then held by Harry Redfield as trustee
an Iowa estate. At that time, B. B. Margolis was advised that the
o notes could be purchased at a substantial discount. In 1955 and
56, Margolis acquired from Redfield four successive options to
quire the two notes. (R. 96.)

In 1955, the public was told of the plans of the Department of
e Navy to acquire the Kearney Mesa land which was within the
ight pattem of the Miramar Naval Air Station. (R. 96.)

In January of 1956, Margolis and three associates acquired
nership of the \$80,000 Kearney Park note, and the deed of trust
curing it, for a total consideration of \$30,000. The undivided
terests in that note were as follows (R. 97):

B. B. Margolis	33 1/3%
Joseph Levikow	33 1/3%
Pauline M. Howarth	25%
L. N. Margolis	8 1/3%
	<hr/> 100%

arney Park had made no principal or interest payments on the note
that time. (R. 97.)

Margolis and his associates, under the date of February 2, 1956,
eated Trust 473, and appointed the Security Trust and Savings Bank
San Diego (Security Trust Bank) as trustee. They assigned the
0,000 note and deed of trust securing it to Trust 473.

Because Margolis and his associates were unable to raise sufficient funds to acquire the \$553,750 Kearney Park note, they had to seek financial assistance from other quarters. Taxpayer Helen Sutherland, the president of Security Trust and Savings Bank, was solicited by Margolis for this purpose. A group of associates, including Margolis, Sutherland and the other taxpayers herein, was formed to acquire the latter note. (R. 97.) The undivided interests of the parties who acquired the \$553,750 Kearney Park note were as follows (R. 98):

	<u>Occupation</u>	<u>Interest</u>
B. B. Margolis	Real estate and insurance	24/120ths
A. J. Sutherland	Banker	12/120
A. Paul Sutherland	Parking lots	12/120
C. D. Dail	Politician	2/120
Joseph Levikow	Broker	12/120
J. M. Wilson	Employee of B. B. Margolis	2/120
Thos. E. Sharp	Retired	20/120
Leon W. Scales	Attorney	4/120
F. S. Parker	Retired	6/120
Pauline M. Howarth	Housewife	20/120
Fred O. West	Unemployed	1/120
L. W. Kimsey	Trust Officer	1/120

Kearney Park had made no principal or interest payments at the time the associates acquired the \$553,750 note. (R. 98.)

The associates owning the \$553,750 Kearney Park note created Trust No. 482, with Security Trust Bank as trustee, and assigned the note to the trust by deed of trust securing it to the bank. (R. 98.)

By 1956, two affiliates of Kearney Park, Myers-Kearney, Inc., and Merit-San Diego, Inc., had acquired from Kearney Park certain parcels of real estate securing the two notes. (R. 98-99.)

Security Trust Bank, as trustee of Trusts 473 and 482, and Kearney Park affiliates entered into an agreement, dated June 15, 1956, relating to the two Kearney Park notes and the property securing the notes. The agreement recited, inter alia, that installments of principal and interest due on the notes, installments of real property taxes, and installments on the municipal improvement bonds were all in arrears. It further recited that the trustee of Trusts 473 and 482 would postpone payments on the two notes and advance certain payments on the improvement bonds in consideration of the trustee being permitted to share in any gain on the disposition of the Kearney Mesa property securing the two notes. (R. 99-100.) Specifically, that agreement provided in part as follows (R. 101):

(d) If the land shall be purchased or condemned by the United States, or other governmental authority, and if the compensation therefor shall be made available for payment on or before December 4, 1957, then all of such compensation shall belong to and shall be disbursed as follows:

(1) To pay off the Improvement Bonds and unpaid property taxes, if required by the terms of the taking, plus payment of the expenses of sale.

(2) To pay in full the principal and interest on the two Kearney Park notes.

(3) To reimburse Trustee for moneys advanced to make payments on Improvement Bonds property taxes, and assessments affecting the land.

(4) To pay \$150,000 to Owners, representing the agreed amount of their investment in the land.

(5) To disburse the balance 50/50 to the Trustee and to the Owners.

(e) The Trustee and Owners shall cooperate in connection with all negotiations or litigation with the United States or other governmental authority seeking to acquire the land; and each party shall be permitted to participate in such negotiations or litigation through agents and counsel of their own choosing.

(f) If, on or before December 4, 1957, the United States or other governmental authority seeking to acquire the land shall file a Declaration of Taking, or shall commence court proceedings, the terms of the Agreement shall be automatically extended until there has been a final determination of compensation due for the taking.

At the time the above agreement was entered into, the only prospect for disposition of the land was to the Navy. (R. 102.)

On December 4, 1957, the trustee of Trusts 473 and 482 entered into an agreement with Kearney Park and its affiliates entitled "Amendment to Agreement" which amended the agreement of June 15, 1956. This agreement recited that no payment of principal or interest had been made on the two notes and that no disposition of the property covered by the agreement of June 15, 1956, had been made. (R. 102.) This agreement then went on to provide in part as follows (R. 103-104):

(d) The parties agree that if all or any part of the real property owned by Owners shall be sold to "any one or more persons," including the United States or any agency thereof, and including any State or municipal corporation, on or before December 4, 1958; or in the event all or a portion of the property is condemned by anyone possessing the power of eminent domain, then all sums realized from the sale or condemnation (if sufficient to discharge the first four items listed below) "shall belong to and shall be disbursed and distributed" as follows:

(1) To pay the Improvement Bonds and property taxes, if required to be paid by the terms of the sale or taking, plus the costs of sale.

(2) To pay principal and interest on the two Kearney Park notes.

(3) To pay trustee for advances made to pay principal, interest, and penalties relative to Improvement Bonds and property taxes or assessments.

(4) To pay Owners the total of sums paid by them subsequent to June 15, 1956, in payment of principal, interest, and penalties relative to Improvement Bonds, property taxes, and assessments.

(5) To pay Owners \$150,000, representing the agreed amount of their investment in the land.

(6) To pay in full any delinquent taxes on, and Improvement Bond principal and interest of Bonds secured by, any of the subject land not sold or taken, unless the parties otherwise agree.

(7) The remainder "shall belong to and shall be distributed to the parties in equal shares."

(e) If any land remains unsold or not condemned (after the payment of the first five items listed in (d), supra), "then Owners will convey to Trustee and (sic.) undivided one-half interest in and to all such land," the conveyance to be made at the time of the distribution of the moneys mentioned in item (7) of (d), supra (paragraph 6).

The acquisition of the land near the Miramar Naval Air Station

is negotiated and finalized by the Navy. Funds for the acquisition

are made available to the Navy for this purpose on February 10,

1958. This included acquisition of the land securing the two notes

in trust. Because the funds finally made available to the Navy for

the land acquisition were reduced in amount, the amount of land

actually acquired by the Navy from Kearney Park and its affiliates

is, in turn, reduced. (R. 104-105.)

The actual negotiations between the Navy, and the selling group (Kearney Park interests, and Trusts 473 and 482) took place on February 14, 1958. At this conference, the Navy made an offer to purchase a part of the subject land for \$1,434,000. The selling group finally offered to sell the total subject land for \$1,500,000, which was accepted by the Navy. (R. 104-105.)

Kearney Park and its affiliates transferred title to 458 acres of Kearney Mesa land to the Navy for the aggregate consideration of \$1,500,000. This acreage acquired by the Navy from the group included all the property securing the \$553,750 note held in Trust 482, and approximately 106 acres of the 220 acres securing the \$1,000,000 note held in Trust 473. (R. 105.)

Pursuant to the agreement of December 4, 1957, Kearney Park and its affiliates conveyed to the trustee of Trust 473 an undivided one-half interest in the real property not purchased by the Navy (approximately 114 acres), which had been covered by the deed of Trust 482 securing the \$80,000 Kearney Park note. (R. 105.)

On March 14 or 15, 1958, B. B. Margolis entered into an agreement with taxpayer Allen Sutherland to assign to Sutherland his beneficial interests in Trusts 473 and 482 for \$200,000. The terms of the agreement provided for cash payment of \$80,000 and Sutherland's promissory note for \$120,000 due in 90 days. Margolis received Sutherland's check for \$200,000, dated April 3, 1958. The \$120,000 balance owing to Margolis from Sutherland was to be paid from funds due Sutherland out of the proceeds of either or both Trusts 473 and 482. (R. 106.)

On April 11, 1958, the trustee of Trusts 473 and 482 received the \$1,500,000 purchase price from the Navy for the land acquired by it. Of the total sum, \$261,500 was received by Trust 473 and 1,238,500 was received by Trust 482. These sums were distributed in accordance with the provisions of the agreement of December 4, 1957. (R. 106.)

On April 15, 1958, the trustee issued checks for taxpayer Allen Sutherland's shares of the monies received from the Navy as follows (R. 107):

(a) Trust 473 (33 1/3% interest) \$49,863.92

(b) Trust 482 (36/120ths interest):

(1) \$120,000 to B. B. Margolis as instructed

(2) \$124,418.21 to Sutherland

The \$120,000 check issued to Margolis was actually delivered to him on April 22, 1958. (R. 107.)

Taxpayers Scales, Mason, Levikow and Howarth computed their gain from the transaction after distribution by the Trusts, and in their income tax returns for the year 1958, reported the gain as capital gain. (R. 107, 114, 116, 119.) Taxpayers Allen Sutherland and Paul Sutherland elected to treat part of their proceeds as non-recognizable gain from involuntary conversion, and a part as ordinary income (interest and discount income). (R. 110-114.)

The Commissioner, in his notices of deficiency to each taxpayer, computed the fair market value of the land (approximately 114 acres) sold to the Navy and transferred to Trust 473 and determined

that the recomputed gain on the sale and distribution by the trusts
as taxable, in full, as ordinary income. (R. 108, 110-111, 113,
114-115, 116-117, 119.)^{2/} As noted above, the deficiencies were paid,
claims for refunds were filed, and after more than six months had
elapsed from the time the claims were filed, suits for refunds were
commenced in the court below. (Nos. 22,013-22,017, R. 2-4; No. 22,018,
2-5.)

Thereafter, the taxpayers filed a motion for summary judgment, with
affidavit on October 25, 1965. (R. 78-82.) The United States on
October 25, 1965, filed a cross-motion, with affidavit, for partial
summary judgment. (R. 124-127.)

On February 17, 1966, the lower court entered an order denying
the Government's motion for summary judgment (R. 167), and granted
summary judgments for the taxpayers (R. 169) which provided that
the defendant refund to "the taxpayers certain "taxes * * * with
interest from the date of payment" on certain "transactions * * *
to the extent that such taxes were assessed on the net proceeds as
ordinary income and not as capital gain." Thereafter, or on April 15,
1966, the Government filed notices of appeals from the judgments.
(R. 183.)

The Commissioner determined additional deficiencies with respect
taxpayer Howarth involving certain payments of alimony. (R. 118-
119.) Since that issue is not in contest in this Court, further
discussion of it would appear unnecessary.

Because the summary judgment failed to decide the issue of the fair market value of the 114 acres of Kearney Mesa land not sold to the Navy, the lower court, on May 31, 1966, rendered a second judgment which recited that the earlier order was only a partial summary judgment, leaving for further litigation the factual issue of the fair market value of such 114 acres. (R. 191.) Rather than trying the issue of the fair market value of the remaining 114 acres, the parties stipulated that the value of that acreage was \$250,000. Accordingly, subsequent thereto, or on March 16, 1967, a so-called stipulated judgment was entered which recited the agreement of the parties that the fair market value of the 114 acres was \$250,000, that no further issues remained to be litigated, and that "therefore, this stipulated judgment coupled with the judgment entered on February 1, 1966, constitutes a final judgment in this matter." (R. 173.)

Thereafter, the taxpayers filed motions seeking to dismiss the Government's notices of appeal. This Court denied those motions. Then, the taxpayers filed a petition for writ of certiorari seeking review of this Court's denial of the taxpayers' motions to dismiss the appeal. The Supreme Court denied the petition.

SUMMARY OF ARGUMENT

The taxpayers, along with others, acquired two promissory notes secured by certain realty at substantial discounts. Taxpayers transferred the notes to two trusts and acquired interests therein equivalent to the interests they held in the notes. In consideration for their forbearance of the collection of the notes, and advancement of certain sums, the trusts acquired the right to receive 50 percent of the profits from the sale of the realty securing the two notes.

It was generally understood at the time that the Department of the Navy expected to purchase the entire tract for Navy purposes.

Thereafter, the Department of the Navy did purchase all the land securing the two notes except 114 acres which it was prevented from purchasing because of a cut back in the funds made available to it. Thus, allowing the sale to the Navy and the resulting consummation of their joint venture, the taxpayers, through the trusts, received payment of the unpaid principal and interest on the two notes, and additionally received 50 percent of the profits from sale of the land, including one-half of the remaining 114 acres. The lower court erroneously held that the entire gain on the transactions was taxable to the taxpayers as capital gain. The Government submits the entire gain is taxable as ordinary income.

The gain from the payment to the taxpayers of the principal and interest of the two promissory notes is clearly ordinary income to them. Where an indebtedness is paid off and discharged, it is well

established that such a transaction does not amount to a sale or
change and thus cannot qualify for the favored capital gains
treatment.

The gain realized by taxpayers from a disposal of their 50
percent profit interest in the real estate is also taxable as ordinary
income. Property which is held for sale to customers in the ordinary
course of one's business is not a capital asset and does not qualify
for capital gain treatment. The taxpayers along with B. B. Margolis,
acquired their interests in both the notes and the underlying real
estate as parties to a joint venture. They held the interest in the
property for no other reason than for sale to customers in the ordinary
course of the business of the joint venture. This Court has already
held that B. B. Margolis, one of the joint venturers, held his
interest in the real property for sale to customers in the ordinary
course of business. That prior holding of this Court unquestionably
characterizes the nature of the instant taxpayers' interest in the
real property and should be binding on them in this action.

ARGUMENT

THE SUMMARY JUDGMENT OF THE DISTRICT COURT THAT ALL OF THE TAXPAYERS' GAIN ON THE TRANSACTIONS WITH RESPECT TO TRUSTS 473 AND 482 CONSTITUTED GAIN FROM THE SALE OR EXCHANGE OF CAPITAL ASSETS TAXABLE AS CAPITAL GAINS WAS CLEARLY WRONG AND SHOULD BE REVERSED ON APPEAL

A. Introductory

All the issues on appeal relate to the taxation of gains

realized by the taxpayers from transactions involving Trusts 473 and

482.

On April 9, 1953, Kearney Park entered into a contract to purchase certain unimproved real property in San Diego, California. To cover a portion of the purchase price it gave two notes secured by trust deeds to the purchased property--the \$80,000 note and the \$53,750 note. The property was located near the Miramar Naval Air Station. In August, 1955, newspapers publicized the fact that the Navy was proposing to enlarge the air station and that additional land, including the Kearney Park property, would have to be acquired for this purpose. (R. 94-96.)

In 1955, the notes were in default. Interest was delinquent. Improvement bonds and property taxes were also delinquent. The holder of the two notes was willing to dispose of the notes at a substantial discount. B. B. Margolis learned of these facts and secured options for the purchase of the notes. (R. 96.)

In January, 1956, taxpayers Levikow and Howarth, together with Margolis, purchased the \$80,000 note for \$30,000. In February, 1956, these individuals created Trust 473 and transferred the note and trust deed to it. (R. 97.) In May, 1956, the taxpayers, Margolis and certain other individuals purchased the \$553,750 note for \$70,000. On June 4, 1956, these associates created Trust 482 and transferred the note and trust deed to it. (R. 97-98.)

The declarations of trust provided that the trustee could, among other things, enter into agreements with the owner of the real estate securing the notes with reference to participation in any gain realized from the sale of the property. On June 15, 1956, the associates, acting through the two trusts, entered into a new contract with Kearney Park superseding the original purchase contract of April 9, 1953. By this new contract and its amendment of December 4, 1957, the trustee agreed to postpone payment of the notes, waive all past defaults, and advance sums of money to Kearney Park to prevent foreclosure of the improvement bonds and tax liens. In consideration therefor, it was agreed that on the sale of the property, the proceeds would be used to pay improvement bonds, taxes, principal of the notes and interest, and a sum of \$150,000 to Kearney Park for its investment in the land. The balance of the proceeds of the sale was then to be divided equally between Kearney Park and the trusts as was also any of the land that remained unsold.

In February, 1958, an agreement to sell to the Navy was entered to by the trustee and Kearney Park. The sale was consummated in April for a total consideration of \$1,500,000 which was distributed in accordance with the agreement of June 15, 1956, as amended. Kearney Park at such time also conveyed to Trust 473, an undivided one-half interest in 114 acres of land not conveyed to the Navy. (R. 105.)

In March of 1958, Margolis sold to taxpayer Allen Sutherland his beneficial interest in Trust 473 and 482 for \$200,000^{3/}. This took place prior to the closing of the agreement with the Navy. (R. 105-.)

On distribution by the Trusts, the taxpayers, in effect, received categories of gain. The first included their pro rata share up to face value of the two notes and the second their pro rata share in proceeds from the sale of the real property to the Navy plus their pro rata share in the balance of the real property (approximately 114 acres) not conveyed to the Navy.

In granting summary judgment, the District Court held (R. 121) that all of the taxpayers' gain from transactions with respect to Trusts 473 and 482, with the exception of certain interest income on the two notes accruing subsequent to their acquisition by taxpayers, constituted capital gains. The Court held that this interest income was ordinary income. (R. 121.)

Margolis was allowed capital gains treatment with respect to the gain derived by him from this transaction (see the opinion of this Court in Margolis v. Commissioner, 337 F. 2d 1001 (C.A. 9th, 1964)). His situation in this respect is clearly distinguishable from that of the taxpayers here in that the latter retained their beneficial interest in the two promissory notes until they were paid off from the proceeds of the Navy purchase.

The Government submits that the lower court's holding was clearly wrong. It is our position that none of the gain qualifies for the favored capital gains treatment, under Section 1221(1) of the Internal Revenue Code of 1954, Appendix, infra, but that for the reasons stated below the entire amount thereof is properly taxable as ordinary income under Section 61(a) of the 1954 Code.

Income is taxed at capital gains rate if it consists of gains realized from the sale of capital assets as defined in Section 1221(1) of the Internal Revenue Code of 1954. The capital gains provisions constitute an exception to the normal tax requirements of the Code and are to be narrowly construed. Commissioner v. P. G. Lake, Inc., 353 U.S. 260; Los Angeles Extension Co. v. United States, 315 F. 2d 101 (C.A. 9th). Thus, in construing the term "capital asset", the Supreme Court, in Commissioner v. Gillette Motor Co., 364 U.S. 130, instructed that (p. 134)--

* * * not everything which can be called property in the ordinary sense and which is outside the statutory exclusion qualifies as a capital asset. This Court has long held that the term "capital asset" is to be construed narrowly in accordance with the purpose of Congress to afford capital-gains treatment only in situations typically involving the realization of appreciation in value accrued over a substantial period of time, and thus to ameliorate the hardship of taxation of the entire gain in one year.

With equal vigor, the Supreme Court has stated that the burden is on the taxpayer to show by substantial evidence that the determination of the Commissioner of Internal Revenue is erroneous. New Colonial Co. v. Helvering, 292 U.S. 435; Welch v. Helvering, 290 U.S. 111; Homann v. Commissioner, 230 F. 2d 671, 672 (C.A. 9th).

reover, on appeal in a case involving summary judgment such as this,
e appellate court should view the case from a standpoint most
vorable to the party against whom judgment is entered (Poller v.
Columbia Broadcasting, 368 U.S. 464), and should liberally construe the
vidence in a light most favorable to the opposing party and resolve
ctual disputes in his favor (Cox v. American Fidelity & Casualty Co.,
F. 2d 616 (C.A. 9th); Pogue v. Great Atlantic and Pacific Tea Co.,
F. 2d 575 (C.A. 5th)).

B. The lower court was clearly in error in holding
that the gain resulting from the payment to the
taxpayers of the face value of the two promiss-
sory notes was taxable as capital gains
rather than as ordinary income

A segment of the proceeds received by Trusts 473 and 482
resented payment of the face value of the two promissory notes
d by those trusts. The Government submits that the proceeds which
strictly attributable to payment of the notes represent the receipt
ordinary income and are taxable as such.

Not every gain growing out of a transaction concerning alleged
tal assets is allowed the benefits of the capital gains tax
visions. Such gains are limited by definition to gains from "sale
exchange" of capital assets. Section 1222(1) and (3), Internal
Revenue Code of 1954, Appendix, infra. And generally, courts have
sed to expand the meaning of the words "sale" and "exchange" and
ruled that these words refer only to such transactions as would
onsidered sales and exchanges in the business world. Fairbanks v.
United States, 306 U.S. 436; Bingham v. Commissioner, 105 F. 2d 971,
(C.A. 2d); Wener v. Commissioner, 242 F. 2d 938, 942 (C.A. 9th).

Where an indebtedness is paid off and discharged, it was early
ld and has been well established that such a transaction does not
ount to a "sale" or "exchange" within the commonly accepted meaning
the words, and thus does not qualify for the favored capital gain
eatment. Fairbanks v. United States, supra; Miller v. United States,
2 F. 2d 584 (C.A. 6th); Wener v. Commissioner, supra; Graham v.
Commissioner, 304 F. 2d 707 (C.A. 2d). The Supreme Court in Fairbanks,
supra, p. 437, succinctly stated that--

Payment and discharge * * * is neither sale
nor exchange within the commonly accepted meaning
of the words.

While the Supreme Court, in Fairbanks, used this language with
reference to the redemption of a bond, it is applicable to the payment
any debt as this Court has so firmly stated. Wener v. Commissioner,
supra, p. 942.

The rationale of this rule is that there is no acquisition of
property by the debtor, no transfer of property to him. In point
law and in legal parlance, the property in the evidence of
indebtedness is extinguished, not sold. In business parlance, the
transaction is a settlement and the evidence of indebtedness is turned
over to him, not sold to him. Wener v. Commissioner, supra, p. 943.

In the instant case, the proceeds which represented payment of
face value of the two notes represented the extinguishment of
debtors obligation, rather than sale or exchange of an asset.
Missing this essential element, the gain on the extinguishment of the
promissory notes was taxable to each taxpayer as ordinary income
rather than as capital gains. Fairbanks v. United States, supra.

Clearly, Section 1232 of the 1954 Code, Appendix, infra, does not rescue the proceeds from payment of the notes from ordinary income treatment. That section provides, in relevant part, that amounts received by the holder on retirement of bonds or other evidences of indebtedness, including promissory notes, which are capital assets in the hands of the taxpayer, shall be considered as amounts received in exchange therefor. However, that section excepts from its compass evidences of indebtedness issued prior to January 1, 1955, which do not have interest coupons or are not in registered form. Because the promissory notes were issued prior to January 1, 1955 (R. 94), and neither had interest coupons nor were in registered form, they are clearly outside the pale of Section 1232.

Additionally, it is the Government's position that the gain from the payment or retirement of the notes does not qualify for capital gains treatment, since the gain represents discount income, the equivalent of interest and is taxable as ordinary income. United States v. Holland-Ross Corp., 381 U.S. 54. In that case, the Court held that gain on the sale of indebtedness attributable to original issue discount was but interest in another form and taxable as ordinary income. The Court instructed that (381 U.S., p. 57)--

Earned original issue discount serves the same function as stated interest, concededly ordinary income and not a capital asset; it is simply "compensation for the use or forbearance of money." Deputy v. du Pont, 308 U.S. 488, 498; * * *. Unlike the typical case of capital appreciation, the earning of discount to maturity is predictable and measurable, and is "essentially a substitute for * * * payments which §22(a) expressly characterizes as gross income [; thus] it must be regarded as ordinary income, and it is immaterial that for some purposes the contract creating the right to such payments may be treated as 'property' or 'capital.'"

Here, the difference between the price taxpayers and their associates paid for the notes and the face values of the indebtedness presents a discount in the value of the notes, payment for the use and forbearance of the money, and the proceeds attributable to that discount represent an income item, taxable as ordinary income. See Arn Products Co. v. Commissioner, 350 U.S. 46, 52; Commissioner v. G. Lake, Inc., supra.

- C. The lower court was clearly in error in holding that the gain realized by the taxpayers on the sale of the Kearney Park land and the distribution of one-half of that portion of such land as was not sold, was taxable as capital gain rather than as ordinary income

In consideration for their advances to Kearney Park and their forbearance of the collection of the principal and interest on the two promissory notes, the taxpayers, through Trusts 473 and 482, acquired the right to share equally in the profits from the sale of the land and to equally in any land that remained unsold which right was secured by trust deed to the property. (R. 100-101.) Upon sale of the land to the Navy, the taxpayers received not only a proportionate part of the proceeds in the taxable year here in issue but also acquired proportionate interests in one-half of the Kearney Park realty that was not sold to the Navy. The issue is whether the gain derived from the sale of the land and the acquisition of the land which was not sold is taxable to the taxpayers as ordinary income or capital gain.

Resolution of this issue depends upon whether the interests in the property held by the taxpayers through the trusts was property

It is obvious that the Navy intended to acquire the entire Kearney Park tract but was prevented from doing so by a cut-back in the funds made available to it. (R. 104.) Thus it is obvious that the remaining land distributed to taxpayers in kind represented a part of the gain or profit derived by them from the consummation of their joint venture.

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held by taxpayers primarily for sale to customers in the ordinary course of business, and therefore not a capital asset within the meaning of Section 1221(1) of the Internal Revenue Code of 1954. The position of the Government is that taxpayers' interests in the realty were held primarily for sale to customers in the ordinary course of business and therefore were not capital assets, within the meaning of the Code, and entitled to capital gain treatment.

The question of whether the property involved was so held within the meaning of the exclusionary language of Section 1221(1) is essentially a question of fact to be determined from the circumstances of each case. Wineberg v. Commissioner, 326 F. 2d 157 (C.A. 9th); Los Angeles Tension Co. v. United States, supra; Starke v. Commissioner, 312 F. 2d 608 (C.A. 9th); Austin v. Commissioner, 263 F. 2d 460 (C.A. 9th). No single factor is conclusive, but the determination must depend on all pertinent facts and their relative importance. Rossiter v. United States, 282 F. 2d 892 (C.A. 7th).

The Government first submits that in the light of the present record there is strong evidence to establish that the property interests held by the taxpayers were held primarily for sale to customers in the ordinary course of business. Moreover, it is obvious that the lower court's own findings on this issue do not provide a factual basis such as would permit a court to conclude by way of summary judgment that the taxpayers qualify for favored capital gains treatment.^{5/} Actually, the findings and conclusions of this Court

Of course, if it is considered that a dispute existed between the parties as to any material fact summary judgment should not have been entered in any event. Rule 56(c), Federal Rules of Civil Procedure; Br v. Mac Dougall, 201 F. 2d 265 (C.A. 2d, 1952); Baron & Holtzoff, Federal Practice and Procedure (1958 ed.), p. 130.

Margolis v. Commissioner, 337 F. 2d 1001 (C.A. 9th), lend support to the Government's position here. In that case, this Court had before it the precise problem here involved, the only factual difference being that Margolis disposed of his beneficial interest in the trusts to taxpayer A. J. Sutherland prior to the completion of the sale of the Kearney Park land to the Navy whereas the instant taxpayers did not. In the Margolis case, supra, p. 1009, this Court stated:

By the new agreement of June 15, 1956, the trusts acquired a new interest in the property--a right to share in any gain upon their sale. This right, secured by a trust deed to the property, constituted an interest in the equity of the property itself, which interest in property was held for sale by the trusts.

For the reasons already discussed * * *, it was proper to disregard the existence of these trusts and to construe the holding for sale as if it were by the taxpayer himself and to construe his sale of his beneficial interest as a sale of property held for sale in the ordinary course of his business. (Emphasis added.)

Thus, the holding of this Court in the Margolis case that B. B. Margolis held his interest in the Kearney Park land for sale to customers in the ordinary course of business supports the Government's contentions in the instant case, and accordingly we respectfully submit that there is sufficient basis for the Court to conclude, as a matter of law, that the property interests involved were not capital assets.

Moreover, it is obvious under the circumstances involved herein that the unimproved real estate in issue could have been held for no other reason, by both Margolis, taxpayers, and associates, than for sale.

certainly, it was not held for the production of rental income since the property remained in an unimproved condition. Moreover, taxpayers and Margolis acquired their interests therein at a time when it was known that the land would be sold to the Navy. Given this, the remaining issue is whether the taxpayers were in the real estate business for the purpose of disposing of this property.

Where two or more individuals combine in a joint enterprise for their mutual benefit, with an understanding that they are to share the profits or losses, each is to have a voice in the management, and the venture acquires property and holds it for sale to customers in the ordinary course of the business of such venture, the profits are clearly taxable as ordinary income rather than as capital gains.

Key v. Commissioner, 334 F. 2d 719 (C.A. 9th); Brady v. Commissioner, T.C. 682, see also, Bauschard v. Commissioner, 279 F. 2d 115 (C.A. 10).

In the Brady case, p. 688, the Tax Court pertinently espoused the principle as follows:

It is generally recognized that a joint venture exists where two or more persons combine in a joint enterprise for their mutual benefit, with an express or implied understanding or agreement that they are to share in the profits or losses of the enterprise and each is to have a voice in the control or management. United States Fidelity & Guaranty Co. v. American Security Co., (M.D. Pa.) 25 F. Supp. 280. One of the characteristics of a joint venture is that usually it is formed to handle a single transaction, rather than to carry on a continuing business. West v. Peoples First National Bank & Trust Co., 378 Pa. 275. Where members of such a venture acquire property, improve its marketability when necessary, and then hold it for sale to customers in the ordinary course of the business of such venture, the profits are taxable as ordinary income rather than as capital gains. * * *

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In the instant case, the taxpayers, along with Margolis, joined together to acquire an interest in the Kearney Park realty after acquisition of their respective interests in the two promissory notes. The taxpayers were originally invited by Margolis to participate in the acquisition of the notes because he was unable to handle the financing of such acquisition by himself. The group acquired their interests at a time when it was common knowledge that the Navy was seriously considering purchasing the entire piece of property. The taxpayers advanced monies to enhance the eventual marketability of the realty. It is clear that profits, losses and expenses were to be shared equally and that all would have an equal voice in the management. (96-105.)

Under these facts, we submit that the arrangement of taxpayers is a joint venture and that the sole purpose of the venture was to hold the real estate for sale to customers in the ordinary course of the venture's operations. Brady v. Commissioner, supra. It is material that taxpayers had other employment and business, for it is well recognized that one may engage in two or more businesses. Goldin v. Commissioner, 195 F. 2d 714 (C.A. 10th); Luckey v. Commissioner, supra.

The taxpayers pooled their capital for the purpose of acquiring an interest in the land and thereafter selling it to realize a profit from their venture. The operation was a one-shot transaction solely designed to dispose of the property at a profit

the course of the operations of the venture. For these reasons,
the gain from these operations is clearly taxable as ordinary income.^{5/}

CONCLUSION

For the foregoing reasons, the judgments of the lower court should
be reversed in total and remanded for entry of judgments for the Govern-
ment.

Respectfully submitted,

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Attention should be called at this point to the fact that the
interest in the venture acquired by taxpayer A. J. Sutherland from
B. Margolis on March 14, 1958, was only held by the former from that
date to April 11, 1958, when the proceeds from the venture were
distributed to him, a period of less than one month. Accordingly, should
the Court find that the gain derived by Mr. Sutherland from this
interest is capital gain such gain would be a short term capital gain
under the provisions of the Internal Revenue Code and should be so
included in the ultimate computation of his tax liability for the
taxable year involved.

APPENDIX

Internal Revenue Code of 1954:

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include--

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

*

*

*

(26 U.S.C. 1964 ed., Sec. 1221.)

SEC. 1222. OTHER TERMS RELATING TO CAPITAL GAINS AND LOSSES.

For purposes of this subtitle--

(1) Short-term capital gain.--The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income.

*

*

*

(3) Long-term capital gain.--The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income.

*

*

*

(26 U.S.C. 1964 ed., Sec. 1222.)

SEC. 1232. BONDS AND OTHER EVIDENCES OF INDEBTEDNESS.

(a) General Rule.--For purposes of this subtitle, in the case of bonds, debentures, notes, or certificates or other evidences of indebtedness, which are capital assets in the hands of the taxpayer, and which are issued by any corporation, or government or political subdivision thereof--

(1) Retirement.-- Amounts received by the holder on retirement of such bonds or other evidences of indebtedness shall be considered as amounts received in exchange therefor (except that in the case of bonds or other evidences of indebtedness issued before January 1, 1955, this paragraph shall apply only to those issued with interest coupons or in registered form, or to those in such form on March 1, 1954).

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*

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(26 U.S.C. 1964 ed., Sec. 1232.)

N O S. 2 2 0 1 3 - 2 2 0 1 8
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON W. SCALES and KATHLEEN A. SCALES,
Plaintiffs-Appellees,

vs.

ROBERT A. RIDDELL,
Defendant-Appellant.

ALLEN J. SUTHERLAND and ESTELLA W. SUTHERLAND,
Plaintiffs-Appellees,

vs.

ROBERT A. RIDDELL,
Defendant-Appellant.

A. PAUL SUTHERLAND and MARLEINE G. SUTHERLAND,
Plaintiffs-Appellees,

vs.

ROBERT A. RIDDELL,
Defendant-Appellant.

MONA J. MASON (Formerly MONA J. PARKER),
Plaintiff-Appellee,

vs.

ROBERT A. RIDDELL,
Defendant-Appellant.

JOSEPH LEVIKOW, JR. and ELIZABETH M. LEVIKOW,
Plaintiffs-Appellees,

vs.

ROBERT A. RIDDELL,
Defendant-Appellant.

FRED J. HOWARTH and PAULINE J. HOWARTH,
Plaintiffs-Appellees,

vs.

ROBERT A. RIDDELL,
Defendant-Appellant.

BRIEF FOR APPELLEES

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST R. MORTENSON
961 East Green Street
Pasadena, California 91101
SY 3-7438

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON W. SCALES and KATHLEEN A. SCALES,
Plaintiffs-Appellees,
vs. No. 22013

ROBERT A. RIDDELL,
Defendant-Appellant.

ALLEN J. SUTHERLAND and ESTELLA W. SUTHERLAND,
Plaintiffs-Appellees,
vs. No. 22014

ROBERT A. RIDDELL,
Defendant-Appellant.

A. PAUL SUTHERLAND and MARLEINE G. SUTHERLAND,
Plaintiff-Appellees,
vs. No. 22015

ROBERT A. RIDDELL,
Defendant-Appellant.

MONA J. MASON (Formerly MONA J. PARKER),
Plaintiff-Appellee,
vs. No. 22016

ROBERT A. RIDDELL,
Defendant-Appellant.

JOSEPH LEVIKOW, JR. and ELIZABETH M. LEVIKOW,
Plaintiffs-Appellees,
vs. No. 22017

ROBERT A. RIDDELL,
Defendant-Appellant.

FRED J. HOWARTH and PAULINE J. HOWARTH,
Plaintiffs-Appellees,
vs. No. 22018

ROBERT A. RIDDELL,
Defendant-Appellant.

BRIEF FOR APPELLEES

STATEMENT OF ISSUES PRESENTED

I

Whether the decision of the District Court is appealable, a

Consent (Stipulated) Judgment having been entered in the case.

II

Whether the gain derived by the taxpayers on the transfer of their interest in trusts 473 and 482 and the Kearney Park land was taxable as capital gain or ordinary income (with the exception of interest on the two Notes involved, accrued from the time they were acquired by the taxpayers until the payment was made by the Navy Department, which is conceded to be ordinary income).

STATEMENT OF THE CASE

Most of the relevant facts involved are stated in the Government's Brief. They may also be found in the Opinion of the Tax Court of the United States (Margolis v. Commissioner, 62086 T.C. Memo) and of this Court in B. B. Margolis, 337 F.2d 1001, 14 AFTR 2d 5667 (CA-9). This case involves trusts 473 and 482 in which the taxpayers participated, the trustee being Security Trust Bank, San Diego, California. These are the same two trusts which were the subject of decision by this Court in the Margolis case.

A Motion to Dismiss the appeal was filed by the taxpayers on or about August 2, 1967. This Court, in considering the Motion, apparently directed its attention to the issue of whether or not a timely Notice of Appeal had been filed by the Government. In its opinion it stated:

"Sua sponte, the Court orders the six cases listed in the caption consolidated.

"The motions to dismiss are denied. Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (9th Cir.).

"The default in filing the records after the final judgments is not so aggravated as to require dismissal."

A Petition for Rehearing was denied.

In a Petition for Certiorari to the Supreme Court of the United States, No. 992, October Term, 1967. the taxpayers gave the following reasons for granting the Writ:

The decision of the Court of Appeals for the Ninth Circuit in the instant case is directly in conflict with five decisions of the United States Supreme Court. The decision is also in conflict with Federal decisions in eight Circuits. The Government filed a four page memorandum in opposition to the taxpayer's Petition. In that memorandum no case was cited to support the proposition that a Consent Judgment was appealable. The thrust of the Government argument was that "these cases are currently pending on the merits in the Court of Appeals. This Court ordinarily declines to review such interlocutory orders as the one below, unless there is a showing of extraordinary circumstances."

It was also asserted "the issue here is not, as the petitioners state (Pet. 2), whether a consent or stipulated judgment is appealable, but whether the District Court's judgment is a consent judgment." Attached hereto as Appendix "A" is a copy of the

stipulated judgment. The Government, in its statement of the case, notes that summary judgments were issued on February 17, 1966 and the Government on April 15, 1966 filed Notices of Appeal. A second Judgment was entered to the effect that that order was only a partial summary judgment because the factual issue of the fair market value of the retained 114 acres of land had not been determined. Then on March 16, 1967 a stipulated judgment was entered; however, no Notice of Appeal was filed as to this final judgment.

SUMMARY OF ARGUMENT

A Consent (Stipulated) Judgment was filed herein on March 16, 1967. The cases in the United States Supreme Court and all Circuits which have decided the issue, uniformly hold that a Consent Judgment is not appealable. At no stage in these proceedings has the Government cited a case contrary to this proposition. The fact of whether or not the Judgment was intended to be a Consent Judgment is of no significance because this Court held in United States v. All American Airways, 180 F.2d 592 (CA-9) that the intention of the parties was of no consequence. It was clear in the All American Airways case that both the Government and the taxpayer thought the judgment was appealable but because of the stipulation entered into between the parties, this Court held that the judgment of the District Court could not be appealed.

On the issue of capital gains vs. ordinary income, this

Court has already passed upon that matter in Margolis v. Commissioner, supra.

The Government in its brief has attempted to introduce some new contentions having to do with "original issue discount" and "joint enterprise". Neither of these issues is related in any respect to those involved herein. The cases cited are Luckey v. Commissioner, 334 F.2d 719 (CA-9), Brady v. Commissioner, 25 T.C. 682 and Bauchard v. Commissioner, 279 F.2d 115 (CA-6). As will appear later these cases have no relation to the instant case.

The Government brief at page 10 notes:

"On April 11, 1958, the trustee of Trusts 473 and 482 received the \$1,500,000 purchase price from the Navy for the land acquired by it. Of the total sum, \$261,500 was received by Trust 473 and \$1,238,500 was received by Trust 482. These sums were distributed in accordance with the provisions of the agreement of December 4, 1957. (R.106)."

Thus, it is evident that payment went from the Navy directly to the Trustee of Trusts 473 and 482. In no sense could this be considered a "pay-off" of the notes or redemption thereof.

With respect to the two notes held in Trusts 473 and 482 this Court decided in the Margolis case as to the identical notes:

"We conclude that the notes were held as investments; that to the extent that taxpayer's

share in the unpaid principal of the notes (and interest due at the time of their acquisition) exceeded his acquisition basis, the sums received upon his deposition of his beneficial interest in the trusts constituted capital gain; to the extent of his share in interest on the notes, accrued subsequent to acquisition, the sums received by taxpayer constituted an assignment of income and were taxable as ordinary income. *Fisher v. Commissioner* (6 Cir. 1954) 209 F.2d 513 (45 AFTR 150), cert. denied (1954) 347 U.S. 1914."

This issue is therefore already settled. Furthermore, the decision of the lower Court in the present case is consistent with the above decision in that accrued interest was held to be ordinary income.

ARGUMENT

I

A STIPULATED JUDGMENT IS NOT REVERSIBLE.

Regarding the Consent (Stipulated) Judgment filed herein, the plaintiffs' Memorandum of Points and Authorities attached to the Motion to Dismiss stated: "As a matter of principle it would seem obvious by its very nature, that a Consent or Stipulated Judgment would not be appealable;" Because it seemed unnecessary to elaborate on this established proposition, only three cases

were cited. Taxpayers did not cite the case of United States v. All American Airways, 180 F. 2d 592 from this Circuit nor some of the cases from eight other Circuits and the United States Supreme Court which uniformly hold that a Consent Judgment is not reversible. The Government has not cited one case from the Circuit Courts of Appeals or the Supreme Court contrary to this proposition. It may be gathered from the short statement made by this Court in denying the Motion to Dismiss in the cases at bar, that the Court made its decision on the basis of the Notice of Appeal issue. The Court cited Ruby v. Secretary of United States Navy, 365 F. 2d 385, which did not involve the matter of a Consent Judgment.

This Court squarely met the Consent Judgment issue in United States v. All American Airways, 180 F. 2d 592. In the per curiam opinion it is stated: "This appeal is from a Consent Judgment -- a Judgment which was consented to by Appellant and Appellee and which the District Court had jurisdiction to render. Such a Judgment is not reversible." (Citations). The Record on Appeal, No. 12347, United States v. All American Airways, Inc., reveals the fact that neither in the Brief for the United States nor for Appellee, All American Airways, Inc., was any reference made to a Consent Judgment. Obviously, both parties thought the judgment was appealable. After this Court held on its own Motion that the Judgment in the above case was not reversible, a Petition for Rehearing was filed by the United States. In its Brief the Government stated: "The appellee has at no time claimed that the

Judgment appealed from was a 'Consent Judgment' -- neither in its Brief nor at the oral argument before the Court. " In a six page affidavit attached to the Petition for Rehearing, Eugene Harpole, Esquire, representing the Government explained that the Stipulation filed was not intended to result in a Consent Judgment and that "Affiant had no authority or instructions in this case to consent to the entry of a judgment in plaintiffs' favor and against the United States. Affiant at no time had any intention of consenting to a Judgment in plaintiffs' favor and against the United States. " Attached to Mr. Harpole's affidavit are Exhibit A and Exhibit B which clearly indicate that both parties understood that an appeal would be taken. (See Exhibit A and Exhibit B and excerpts from the Record on Appeal in that case in Appendix "B" herein). In the All American Airways case, as is shown on pages 13, 14, 15 and 16 of the Record (No. 12347), the Government attorney and the attorney for plaintiff signed a Stipulation. The Judgment itself was signed only by the United States District Judge and was not designated a Stipulated or Consent Judgment.

As shown in the copy of the stipulated judgment in this case, attached hereto as Appendix "A", the Judgment itself was designated a "Stipulated Judgment" and recited in paragraph Two. '2. There exists no further issues left to be litigated, and, therefore, this Stipulated Judgment coupled with the Judgment entered on February 17, 1966 constitutes a final judgment of this matter. "

It is thus crystal clear that the instant case comes squarely

within the decision of United States v. All American Airways and the decisions listed below.

The five decisions of the United States Supreme Court which hold a Consent Judgment not to be reversible are:

Pacific R. Co. v. Ketchum, 101 U. S. 289, 295
25 L. Ed. 932, 935 (1880).

United States v. Babbitt, 104 U. S. 767, 768.
26 L. Ed. 921, 922 (1882);

Nashville, C. & St. L. Ry. Co. v. United States
113 U. S. 261, 266, 26 L. Ed. 971, 973.
5 S. Ct. 460 (1885).

Swift & Co. v. United States, 176 U. S. 311, 314.
72 L. Ed. 587, 595, 49 S. Ct. 311 (1926).

N. L. R. B. v. Ochoa Fertilizer Corp., 368 U. S.
318, 323, 7 L. Ed. 2d 312, 313.
62 S. Ct. 344 (1961).

In addition to the All American Airways case decided in this Circuit the following eight Circuits held consent decisions not reversible.

C. A. 1 - Ballot v. United States, 171 Fed. 404,
405 (1909);

C. A. 2 - Kelly's Trust v. Commissioner, 188
F. 2d 198, 199 (1948);

C. A. 3 - White & Yarbrough v. Dalley, 228 F. 2d
836, 837 (1955);

C. A. 6 - Pergola v. Penn R. Co., 311 F. 2d 637,

839 (1963);

C. A. 7 - Stewart v. Lincoln-Douglas Hotel Corp.,
208 F.2d 379, 381 (1953);

C. A. 8 - Walling v. Miller, 138 F.2d 629, 631
(1943);

C. A. 10 - United States v. Star Construction Co.,
186 F.2d 666, 669 (1953);

Dist. of Col. - Curry v. Curry, 65 App. D.C. 47,
79 F.2d 172, 174 (1935).

A brief statement, directly in point, from the above decisions of the Supreme Court and the Circuit Courts is more enlightening than a summary of those decisions:

Pacific R. Co. v. Ketchum, supra -- "If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent," 101 U.S. at 295;

United States v. Babbitt, supra -- "In R. R. Co. v. Ketchum, 101 U.S., 289, we decided that when a decree was rendered by consent, no errors would be considered here on appeal which were in law waived by such a consent. . . . The consent to the judgment below was in law, a waiver of the error now complained of." 104 U.S. at 768;

Nashville, C. & St. L. Ry. Co. v. United States,

the appeal fails." 228 F. 2d at 837 (C. A. 5);

Pergola v. Penn R. Co., supra -- "No error can be asserted in the dismissal of the claim under the Federal Employers' Liability Act as this was done with the consent of plaintiff." 311 F. 2d at 839 (C. A. 6);

Stewart v. Lincoln-Douglas Hotel Corp., supra -- "It is a generally accepted rule of long standing that a party who agrees or consents to the entry of an order or judgment thereby waives his right to claim that the trial court committed error in the entry of the order." 208 F. 2d at 381 (C. A. 7);

Walling v. Miller, supra -- "All errors going to the merits . . . are waived by consent to the decree." 138 F. 2d at 631 (C. A. 8);

United States v. All American Airways, supra -- "Such a [consent] judgment is not reversible." 180 F. 2d at 592 (C. A. 9);

United States v. Star Construction Co., supra -- "A party is not aggrieved by a ruling regularly made, with his express or implied consent," 186 F. 2d at 669 (C. A. 10);

Curry v. Curry, supra -- "For a consent decree, . . . is valid and binding upon all parties consenting, open neither to direct appeal nor col-

lateral attack." 79 F.2d at 174 (C.A. Dist. of Col.).

Counsel for taxpayers, in his research of cases involving consent or stipulated judgments (including the two circuits (3d and 4th) not listed above) has been unable to find any authority holding directly or indirectly that a consent judgment is appealable.

Additionally, it does not appear possible that any exceptions to the rule mentioned in N. L. R. B. v. Ochoa Fertilizer Corp., supra, apply. The exceptions mentioned are lack of Federal jurisdiction, lack of actual consent, and fraud in the procurement. The Federal Courts obviously have jurisdiction of tax matters and the fact that the consent judgment (Appendix A) was prepared in the office of the United States Attorney and contains the statement, "There exists [sic] no further issues left to be litigated and, therefore, this Stipulated Judgment . . . constitutes a final judgment of this matter," precludes a claim of fraud or lack of consent.

It is thus apparent that if this Court decides the lower court's judgment to be reversible, it will be in direct conflict with the five United States Supreme Court cases cited above together with cases from eight Circuits. As previously stated, the Government has not cited one appellate case holding a Consent or Stipulated Judgment to be appealable.

II

THE GAIN ON THE NOTES WAS NOT DISCOUNT INCOME

The Government argues "that the gain from the payment or retirement of the Notes does not qualify for capital gains treatment, since the gain represents discount income, the equivalent of interest and is taxable as ordinary income. United States v. Midland-Ross Corp., 381 U S. 54." (Government's brief p. 21) Original issue discount has been defined as the difference between the issue price of the obligation and its stated redemption price at maturity. The two notes involved herein were acquired by the taxpayers from a third party, Harry M. Redfield, Trustee for an Iowa estate (TC opinion B.B. Margolis p. 62-513; also Record on Appeal Court of Appeals 9th Circuit No. 18499 and 18500, Volume I, p. 129). It would indeed be a startling surprise to the financial world if, under the circumstances in this case, it was held that the difference between the purchase price and the face amount of the notes were deemed to represent original discount income.

In United States v. Midland-Ross Corp., supra, the Supreme Court stated "Earned original issue discount serves the same function as stated interest, conceded ordinary income and not a capital asset; it is simply 'compensation for the use or the forbearance of money.' " It is further stated "the \$6 earned on a one-year note for \$106 issued for \$100 is precisely

like the \$6 earned on a one-year loan of \$100 at 6% stated interest. The application of general principles would indicate, therefore, that earned original issue discount, like stated interest, should be taxed under §22(a) as ordinary income. "

Obviously, there was no "original discount" in this case. The transfer was from Harry M. Redfield, a third party, not the issuer of the notes. The record is void of any suggestion of notes issued at discount.

To repeat, the two notes were not issued to the taxpayers. They acquired the notes from a third party so there can be no issue here of discount income.

III

THE GAIN REALIZED BY THE TAXPAYERS ON THE SALE OF THE KEARNEY PARK LAND AND THE DISTRIBUTION OF ONE-HALF OF THAT PORTION OF SUCH LAND AS WAS NOT SOLD, WAS TAXABLE AS CAPITAL GAIN.

The Government has advanced the argument that "where two or more individuals combine in a joint enterprise for their mutual benefit with an understanding that they are to share in the profits or losses, each to have a voice in the management, and the venture acquires property and holds it for sales to customers in the ordinary course of the business of such venture the profits are clearly taxable as ordinary income rather than as capital gains. Luckey v Commissioner, 334 F.2d 719 (CA-9); Brady v. Commissioner, 25 TC 682, see also Baushard v. Commissioner, 279 F.2d 115 (CA-6)." (Govt. Br. p. 25).

In the Brady case there were sixty-eight improved residential lots which were sold in the following way as indicated on pages 685 and 687 in the Tax Court Opinion.

Fifteen lots were sold on August 21, 1946, one lot October 18, 1946, ten lots January 31, 1947, one lot May 5, 1947, two lots September 25, 1947, seventeen lots October 8, 1947, eighteen lots October 9, 1947 and four lots August 2, 1948.

Since the issue involves "sales to customers in the ordinary course of business" this is a far cry from the involuntary conversion feature of the instant case where one transfer was made. It should be noted also that a Mr. Lawler who was associated with the

petitioner Brady "engaged principally in the management of real estate" and Mr. Slocum, another associate, "was a licensed real estate dealer who had carried on that business for nearly forty years." A Mr. Christo, the only other associate, "was a member of the Pittsburgh Real Estate Board who advertised and otherwise held himself out as being in the real estate business and he derived a substantial portion of his income from real estate sales."

In Luckey v. Commissioner, supra, the taxpayers were part of a syndicate of seven members organized to purchase and develop some lakeshore land. The taxpayers received a part of the distributive share in the form of lots rather than profits. The petitioner received seven lakefront lots and sold four of them during the taxable years 1958 and 1959. It was held that the taxpayer received the lots in a distribution from a joint venture in which he participated. But note that the special provision of § 735(a)(2) of the 1954 Code applied and that made his profit, on the resale of the lots (within five years after receiving them) taxable as ordinary income. The gist of the holding was that the associated corporation developed tracts, built houses on the tracts and sold them as part of the taxpayers' business. These facts have no relation to the instant case.

In the Baushard case, supra, the petitioner joined with "a close friend named Tonti", who was a real estate developer, in the development of certain property. A local druggist by the name of Haney invested money in the venture. The property was purchased for approximately \$77,000 and title was taken in the name of two trustees. A corporation was organized by Tonti for the purpose of subdividing and improving the property

Sixty-five separate sales were made of the lots involving 23 purchasers. The total sales prices received by the corporation was \$574,208. The Court held that the lots from which the taxpayer realized gains were held primarily for sale to customers and accordingly were not capital assets within the meaning of the statute. In its opinion the Sixth Circuit stated: "Whether the arrangements between the two were technically sufficient to constitute a joint venture we regard as immaterial. If not a joint venture, the relationship of principal and agent clearly existed." It is thus crystal clear that the Luckey, Brady and Baushard cases have no relevance in this case whether or not there was a joint venture. Here there was no subdivision and sale of lots. In fact, there was only one transfer and that was to the Navy Department under threat of condemnation.

This Court is dealing with the same two trusts (Nos. 473 and 482) which were the subject of decision in Margolis v. Commissioner, supra. It was there stated: [6] "By the agreement of June 15, 1956, the trusts acquired a new interest in the property - a right to share in any gain upon their sale. This right, secured by a Trust Deed to the property, constituted an interest in the equity of the property itself which interest in property was held for sale by the trusts."

It should be noted that this Court did not say that the trusts held the property for sale to customers in the ordinary course of business. The Code provision clearly specifies that the property must be held for sale in the ordinary course of

business if ordinary income rates are to apply. In the Margolis case as the opinion of this Court shows, Margolis' transactions were considered "in seven groupings." Margolis, as the opinion indicates, "for a long period of years" had been "engaged in over 4,000 real estate transactions." This Court held in the Margolis case that he was in the business of buying and selling real estate and that his interests in Trusts 473 and 482 constituted capital assets.

The Government has failed to recognize the basis of this Court's decision. The Margolis interests were capital assets but Margolis was in the business of buying and selling real estate. Therefore in his particular case the gain should be treated as ordinary income simply and solely because he was in the business of buying and selling real estate in the ordinary course of his business.

Since our taxpayers were not in the business of buying and selling real estate to customers in the ordinary course of business they are entitled to treat the proceeds under the capital gains provisions. This follows irrevocably from the above quoted opinion of this Court in Margolis, where it is said:

"By the agreement of June 15, 1956, the trusts acquired a new interest in the property - a right to share in any gain upon their sale. This right, secured by a trust deed to the property, constituted an interest in the equity of the property itself, which interest in property was held for sale

by the trusts."

In the next paragraph this Court then gives the basis for holding that Margolis could not have the benefit of capital gains treatment. The trust was to be ignored and the sale treated "as a sale of property held for sale in the ordinary course of business." This is not surprising since the record shows Margolis had been "engaged in over 4,000 real estate transactions."

IV

THERE WAS NO "PROPERTY HELD BY THE TAXPAYER PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF HIS TRADE OR BUSINESS". 1/

There is no quarrel with the statement in the Government brief, page 23, that: "The question of whether the property involved was so held within the meaning of the exclusionary language of § 1221(1) is essentially a question of fact to be determined from the circumstances of each case." Five cases are cited to support this proposition including Starke v. Commissioner, 312 F.2d 608, and Austin v. Commissioner, 263 F.2d 460, decided in this Circuit. In the Starke case the taxpayer made many sales of lots in the San Diego area. He reported the income as capital gains and the Commissioner determined

1/ This phrase is part of § 1221 reproduced in the appendix to the Government Brief.

that it should have been reported as ordinary income. The Tax Court sustained the Commissioner. This Court reversed the Tax Court and agreed with the taxpayer stating "No one element is dispositive. But here there is no evidence of a campaign to sell, no advertising, no 'holding out' ".

In Austin v. Commissioner, supra, the taxpayer acquired and sold many lots in the Manhattan Beach area of California during the period 1918 to 1952. This Court reversed the Tax Court which held that the income was ordinary income and not capital gains. The Court stated "It is our view, based upon the entire record, that Petitioner was not engaged in the business of selling real property during the tax years in question, and that the properties sold were not being held primarily for sale to customers." In the course of its opinion this Court stated:

"We come now to the question as to whether or not these properties were held by petitioners primarily for sale to customers in the ordinary course of petitioner's trade or business. Admittedly, petitioner was engaged in the practice of law throughout the period involved. He was also active in the civic affairs of his home city. Was petitioner also engaged in the business of selling real estate, and was the property held primarily for sale to customers? The words and phrases 'trade or business', 'ordinary' and 'customers' are to be construed in their ordinary meanings. 'To be engaged in the

real estate business means to be engaged in that business "in the sense that the term usually implies." ' Yunker v. Commissioner of Internal Revenue, 256 F.2d 130 [1 AFTR 2d 1559]. The word 'business' ' . . . implies that one is kept more or less busy, that the activity is an occupation. It need not be one's sole occupation, nor take all his time. It may be only seasonal, and not active the year round. It ordinarily is implied that one's own attention and efforts are involved ' Snell v. Commissioner of Internal Revenue, 97 F.2d 891 [21 AFTR 608]. As stated in Fahs v. Crawford, 161 F.2d 315 [35 AFTR 1228], at page 317, 'Of course, a person may be engaged in more than one business, and may carry on his business through others. Carrying on a business, however, implies an occupational undertaking to which one habitually devotes time, attention, or effort with substantial regularity. Merely disposing of investment assets at intermittent intervals, without more, is not engaging in business, even though some preliminary effort is necessary to render the asset saleable.

"The record in this case discloses that neither petitioner was a licensed real estate agent or broker. They did no advertising whatsoever to

promote the sales of their property. They did not post any 'for sale' signs on their property. They did not list their property with real estate brokers. The record does not show a single activity on the part of the petitioners that they were holding their property for sale. All that the record shows is that the property was being held by petitioners." (Emphasis added).

In the case at bar there is not an iota of evidence in the record indicating that the taxpayers advertised the property, posted "For Sale" signs on the property or listed the property with real estate brokers. As in the Austin case "all that the record shows is that the property was being held by (taxpayers)".

Last month Commissioner v. Tri-S Corporation (No. 9839) was decided in the Tenth Circuit. That case is startlingly similar to the instant case. Eighty acres of "raw and wholly unimproved land" were bought by the taxpayer on October 10, 1960. The State of Colorado acquired 20 acres of this land under threat of condemnation on October 6, 1961. The taxpayer on his return reported the gain on the 20 acres as capital gain. The Commissioner held it to be ordinary income but on petition to review the Tax Court decided it was capital gain. (Tri-S Corporation v. Commissioner, 48 T.C. 316.) The Court of Appeals affirmed.

In its Opinion the Tenth Circuit noted:

"During all times here material, the taxpayer was engaged in the business of a residential land

developer, and developed and sold improved lots and homes to individual buyers. 'It sometimes' purchased 'finished sites, ' built 'houses on such sites' and sold 'them to prospective home owners. '

"When it purchased the 80-tract of raw land, the taxpayer intended and planned at some time in the future to develop 60 acres of the 80-acre tract by constructing streets, sidewalks, gutters, sewers, and water lines, and to build homes on lots and sell them to prospective customers. It also then intended and planned at some time in the future to develop the 20-acre tract sold to the State as a shopping center site and to improve such 20-acre tract for that purpose. Such future plans were evidenced by a master plat of the 80-acre tract, showing planned future development, prepared by the taxpayer before April 7, 1961."

Further on the Court stated:

"In 1961 the State of Colorado desired to acquire the 20-acre tract, later conveyed to it, for the construction of an arterial highway, extending southerly from Interstate Highway No. 70. On April 7, 1961, the Colorado State Highway Department notified the taxpayer that condemnation proceedings would be instituted to take a portion of the land (the 20-acre tract) by eminent domain for use as an arterial highway extending southerly from Interstate Highway No. 70.

"Negotiations between the taxpayer and the

Highway Department followed and on July 25, 1961, the taxpayer agreed to convey such 20-acre tract to the State of Colorado for \$130,000. The conveyance was consummated on October 6, 1961.

"The Tax Court found the facts as above stated, and further found:

"The taxpayer, 'after April 7, 1961,' was not holding the 20-acre tract ' "primarily for sale to customers in the ordinary course of his trade or business" within the meaning of section 1221(1)' ⁴ and did not sell such 20-acre tract 'to a customer in the ordinary course of its business. It did not seek the sale to' the State of Colorado 'or any other sale of that raw land.' 'The property sold was a capital asset at the time of the sale.'

"In Coffey v. United States, 10 Cir., 333 F.2d 945, 947, the court quoted with approval from Friend v. Commissioner, 10 Cir., 198 F.2d 285, 287, as follows:

'It is the well settled rule that whether property sold or otherwise disposed of by a taxpayer was held by him for sale to customers in the ordinary course of his trade or business, within the meaning of section 117 [§ 1221], is essentially a question of fact. * * *'

"The taxpayer never at any time held such

20-acre tract for sale in its raw state to customers in the ordinary course of its trade or business. It intended to sell such 20-acre tract at some time in the future, only after it had improved the same so as to make it suitable for a shopping center or homesites.

"During the period from April 7, 1961, to October 6, 1961, it is clear under the facts that the taxpayer was not holding the 20-acre tract primarily for sale to customers in the ordinary course of its trade or business. While prior to April 7, 1961, it had intended at some time in the future to improve the 20-acre tract, so as to render it suitable for a shopping center and to make disposition of it for that purpose, from and after that date it would have been futile for it to have undertaken to carry out such future plans. It clearly did not hold such land for sale to customers in the ordinary course of its trade or business on July 25, 1961, when it agreed to convey the 20-acre tract to the State of Colorado, and on October 6, 1961, when it consummated such conveyance.

"Accordingly, the decision of the Tax Court is affirmed.

"4 26 USCA § 1221 (1954 Ed.) in part here material reads:

" '§ 1221. Capital asset defined

'For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include-

'(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. . . .'

This rather lengthy quotation is inserted to demonstrate what is contended to be the proper application of the capital gains provisions, particularly in a condemnation situation. In Tri-S Corporation the taxpayer "was engaged in the business of a residential land developer" and purchased the 80 acres with intention of having the condemned 20 acres developed "as a shopping center site". Nevertheless, the gain was held to be capital gain not ordinary income.

It is evident that the property involved in Trusts 473 and 482, herein, was handled in such a way that even the inferences possible in Tri-S Corporation could not here convert the proceeds into ordinary income.

The exception that applies to capital assets cuts both ways as indicated in James M. Fidler v. Commissioner, 20 T.C. 1081, 231 F.2d 138 (CA-9). The taxpayer was a radio announcer who had bought certain books and manuscripts which he sold at a loss of \$4,750. He deducted the loss on his tax return as an ordinary loss. The Tax Court in deciding that it was a loss from a sale of capital assets commented "had petitioner sold the literary properties at a profit, he would no doubt have claimed that they

were capital assets and that he would have been entitled to the favorable treatment accorded to capital gains."

This Court on appeal (Fidler v. Commissioner, 231 F.2d 138) sustained the Tax Court stating that Fidler did not hold the property "primarily for sale to customers in the ordinary course of his trade or business. . . . He was not 'engaged in a trade or business with respect to the literary properties.' "

By the same token, if the six taxpayers herein had been unfortunate enough to take a loss on the venture, the Government would undoubtedly have taken the position that it was a capital loss and not an ordinary loss.

V

THE NOTES ARE CAPITAL ASSETS

It is difficult to understand how the Government can argue that the amount of the difference between the cost of the notes and their face value credited when the \$1,500,000 was received from the Navy constituted ordinary income. This Court in the Margolis case settled this issue once and for all. In "(5)(a) as to the notes" it says: "The Tax Court has refused to treat the notes as investments." Then after quoting from the Tax Court opinion it states: "We cannot agree" "We conclude that the notes were held as investments;"

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the lower Court should be affirmed.

Respectfully submitted,

ERNEST R. MORTENSON

Attorney for Appellees.

APPENDIX A

JOHN K. VAN de KAMP
United States Attorney
LOYAL E. KEIR
Assistant U. S. Attorney
Chief, Tax Division
DONALD M. FENMORE
Assistant U. S. Attorney
808 U. S. Courthouse
Los Angeles, California
Telephone: 688-2434

Attorneys for Defendant

FILED
Mar. 16, 1967
Clerk, U.S. District Court
Central District of California
By

Deputy

Entered
Mar. 16, 1967
Clerk, U.S. District Court
Central District of California
By

Deputy

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LEON W. SCALES and
KATHLEEN A. SCALES,
et al.,

In Case No. 65-269-PH and the
following numbered cases:

Plaintiffs,

65-319-PH; 65-320-PH; 65-469-PH;

65-526-PH; 65-932-PH

ROBERT A. RIDDELL.,

STIPULATED JUDGMENT

Defendant.

IT IS HEREBY STIPULATED AND ADJUDGED by and
between Allen J. Sutherland and Estella W. Sutherland, plaintiffs
herein, and the United States of America, defendant herein,

APPENDIX A

through their respective counsel of record, that:

1. The fair market value of the subject 114 acres of real property is \$250,000.00.

2. There exists no further issues left to be litigated, and, therefore, this Stipulated Judgment coupled with the Judgment entered on February 17, 1966 constitutes a final judgment of this matter.

DATED: March 8, 1967

JKV
LEK
DMF
Jy

/s/ Ernest R. Mortenson
ERNEST R. MORTENSON
Attorney for Plaintiffs

JOHN K. VAN de KAMP
United States Attorney
LOYAL E. KEIR
Assistant U. S. Attorney
Chief, Tax Division
DONALD M. FENMORE
Assistant U.S. Attorney

/s/ Donald M. Fenmore
DONALD M. FENMORE
Attorneys for United States of America

IT IS SO ORDERED this
16 day of March, 1967
/s/ Peirson M. Hall

United States District Judge

I hereby attest and certify on Jun 1 1967 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

JOHN A. CHILDRESS
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

By /s/ Danny Ussery Deputy

DANNY USSERY

APPENDIX B

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated between plaintiff and defendant United States of America through their attorneys of record:

1. That defendant United States of America will not file an answer or other or further pleading to plaintiff's complaint.
2. That the action may be dismissed as to all fictitiously named defendants.
3. That plaintiff may apply forthwith for judgment in the form attached hereto marked Exhibit A and that the judgment may be signed and entered by the court exparte and without service of a three-day written notice as provided by Rule 55(b)(2), Federal Rules of Civil Procedure.
4. That the judgment may be signed and entered on the allegations in plaintiff's complaint without supporting evidence [13] and without other or further compliance with rule 55(e), Federal Rules of Civil Procedure.

Dated: June 3rd, 1949.

JAMES M. CARTER,
United States Attorney.
E. H. MITCHELL,
Assistant U. S. Attorney.
EUGENE HARPOLE and
ROBERT D. SCOTT,
Special Attorneys, Bureau of
Internal Revenue.

APPENDIX B

B-1.

By /s/ EUGENE HARPOLE,
Attorneys for Defendant,
United States of America.
GUTHRIE, DARLING &
SHATTUCK,

By /s/ MILO V. OLSON
Attorneys for Plaintiff.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

JUDGMENT

The motion of defendant United States of America to dismiss the above-entitled action having been argued, heard and denied on May 16, 1949, and plaintiff and defendant United States of America having stipulated in the record of the above-entitled proceeding that no answer or further pleading to plaintiff's complaint will be filed by defendant United States of America, and the court having been fully advised and good cause therefor appearing,

It is Found, Ordered, Adjudged and Decreed:

1. That this Court has jurisdiction of the cause of action set forth in plaintiff's complaint.
2. That all of the allegations in plaintiff's complaint are true, except the allegations in Paragraph III thereof which are found to be immaterial.
3. That plaintiff is the owner of the following described [18] airplanes which are the subject matter of the within action:

One Douglas DC-3, No. NC54312, purchased May 19, 1948;

One Douglas DC-3, No. NC49277, purchased May 19, 1948;

One Douglas DC-3, No. NC16839, purchased June 15, 1948.

4. That the action be and it is dismissed as against the fictitiously named defendants.

5. That plaintiff is a bona fide purchaser of the airplanes described in Paragraph 3 of this judgment without notice of any claim of defendant, United States of America, in and to any of said airplanes because of the failure of defendant, United States of America, to record any notice or claim of its tax lien or liens against Northern Airlines, Inc., with the Civil Aeronautics Board or the administrator of the Civil Aeronautics Board in accordance with the provisions of the Civil Aeronautics Act prior to the time plaintiff acquired ownership of said airplanes.

6. That defendant United States of America has no estate, right, title, interest or lien in or to any of the airplanes described in Paragraph 3 of this judgment, prior, superior or adverse to the estate, right, title and interest of plaintiff.

7. That defendant United States of America and all persons, firms, corporations and bodies politic acting under or through defendant United States of America be and they are forever barred and enjoined from asserting any claim in or to any of the airplanes described in Paragraph 3 of this judgment as against plaintiff's interest and ownership therein, by reason of or arising out of any unpaid taxes owing or claimed to be owed by Northern Airlines, Inc., to defendant United States of America.

8. That plaintiff's right, title, interest and possession in and to the airplanes described in Paragraph 3 of this judgment be and they are quieted against any right, title, interest, lien or

claim of defendant United States of America or any person, firm,
corporation or body politic acting under or through defendant
United States of America.

Dated: June 7, 1949.

By /s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed June 7, 1949 [19]

EXCERPT FROM RECORD -- MOTION FOR
REHEARING UNITED STATES v. ALL AM-
ERICAN AIRWAYS, 180 F. 2d 592 (C. A. -9)
#12347

3. The mechanics which the parties chose in the court below, for the purpose of giving effect to their intention to eliminate further useless proceedings in the trial court and to pave the way for the prompt entry of a judgment from which United States could prosecute its appeal, consisted of the stipulation. [R. 13-14.] Aside from disposing of the action as to the fictitiously named defendants, the stipulation does no more than state: (1) that the United States would not plead over, i. e., that it would stand on its motion to dismiss; (2) that the appellee could apply forthwith for judgment, which was approved as to form; (3) that the three-day notice required by Rule 55(b)(2) of the Federal Rules of Civil Procedure was waived; and (4) that the judgment could be entered on the allegations of the complaint, without the introduction of evidence prescribed by Rule 55(e) of the Federal Rules of Civil Procedure.

We submit that a detailed analysis of the terms of the stipulation establishes beyond the possibility of any doubt that, other than as to form and as to the procedural requirements above indicated, there was no consent by the United States to a judgment against it. The first paragraph merely announces that the United States would not plead over, while the second paragraph disposes of the fictitiously named defendants, and, quite obviously, no

consent to a judgment could possibly be "interpreted" from either of those paragraphs. The statement in paragraph three that "plaintiff may apply forthwith for judgment in the form attached hereto marked Exhibit A" [R. 13] is clearly no more than an approval as to the form of the judgment,^{5/} and obviously no consent can be implied from that. The further statement in paragraph three of the stipulation, "that the judgment may be signed and entered by the court ex parte and without service of a three-day written notice as provided by Rule 55(b)(2), Federal Rules of Civil Procedure" [R. 13], is clearly only a waiver of that three-day notice,^{6/} and it would be palpably wrong to construe that language as amounting to a consent on the part of the United States to the entry of a judgment against it, we submit. . . . Besides serving as a deterrent against such cooperation between counsel in the future, the decision of this Court in this case, if permitted to stand, would constitute an unjust and unwarranted deprivation of the right of the United States to appeal by erroneously assuming that the United States had consented to the judgment against it, whereas in fact it had merely agreed to the form of the judgment and agreed to do away with certain procedural requirements.

4. It is our position that the language of the stipulation itself establishes beyond any possible doubt that, aside from agreeing as to matters of form or procedure, the United States did not consent to the entry of a judgment against it. However,

stipulation -- which we emphatically insist is impossible -- such doubt would be readily dispelled by an analysis of the judgment itself. [R. 14-16] It does not contain even the slightest suggestion that the judgment is a "consent judgment." The preliminary or opening paragraph of the judgment [R. 14-15] merely shows that the court is deciding the case after the United States, whose motion to dismiss had been denied, had declined to plead over -- i. e. , was standing on its motion, just as a litigant would stand on his demurrer under the old practice.

7. Finally, attention is invited to a further, and indeed quite significant, indication that the judgment appealed from was not a "consent" judgment. The appellee has at no time claimed that the judgment appealed from was a "consent judgment" -- neither in its brief, nor at the oral argument before the Court. ^{8/}

8/

No question as to whether the judgment appealed from might be a "consent judgment" was raised even by the Court at the oral argument. Aside from the merits of the appeal, the only query raised by the Court was as to whether Rule 55(e), requiring the submission of evidence before a default judgment can be entered against the United States, might not have to be complied with literally -- as to which query counsel pointed out that, in substance, what had been done was the same as stipulating the facts in the case.

Wherefore, in view of the foregoing, the United States respectfully requests that this, its petition for rehearing, be granted by this Honorable Court, and that the Court's per curiam opinion and judgment rendered and entered herein on February 17, 1950, be vacated and set aside and that a rehearing be granted and the appeal of the United States be considered on the merits.

Respectfully submitted,

Theron Lamar Caudle,
Assistant Attorney General;

Ellis N. Slack,

Harry Marselli,
Special Assistants to the Attorney General.

Ernest A. Tolin,
United States Attorney;

E. H. Mitchell,
Assistant United States Attorney.

March 13, 1950.

(Attached to Harpole Affidavit)

Exhibit A.

Stanley W. Guthrie
Hugh W. Darling
Edward S. Shattuck
Milo V. Olson
Arthur C. Jones, Jr.
George G. Gute

Trinity 8104

Law Offices
GUTHRIE, DARLING & SHATTUCK
737 Pacific Mutual Building
Los Angeles 14

May 16, 1949

Mr. Eugene Harpole
Mr. Robert D. Scott
Bureau of Internal Revenue
1727 Federal Building
Los Angeles 12, California

Gentlemen:

All American v. U. S.

Enclosed is a notice of ruling. I understand the defendant will
not answer but will take an appeal.

Cordially,

MILO V. OLSON
MILO V. OLSON,
of
GUTHRIE, DARLING & SHATTUCK.

MVO:r

Exhitib B.

TELETYPE UNIT
MAY 31 AM 8:19
PUBLIC BLDGS. ADM
LOS ANGELES

T
402 LA WAY J-D
WASHINGTON DC 5-31-49 1114A

CARTER UNITED STATES ATTORNEY
LA

RE ALL AMERICAN AIRWAYS INC VERSUS UNITED
STATES NUMBER 8860-WC YOUR REFERENCE EHM/EH/
RDS/MRK LET JUDGMENT BE ENTERED ON GOVERNMENTS
MOTION TO DISMISS. ADVICE CONCERNING ATTORNEY
GENERALS DICISION ON QUESTION OF APPEAL WILL BE
FORWARDED ON AN EARLY DATE.

CAUDLE ASSISTANT ATTORNEY GENERAL JUSTICE
DEPARTMENT

8860-WC
RR 1116A

No. 22020 ✓

United States
COURT OF APPEALS
for the Ninth Circuit

BEATRICE M. MACOMBER,

Appellant.

vs.

JAMES BOSE and ETHYL JOYCE BOSE,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Montana.

FILED

AUG 21 1967

WM. B. LUCK, CLERK

UG 25 1967

No. 22020

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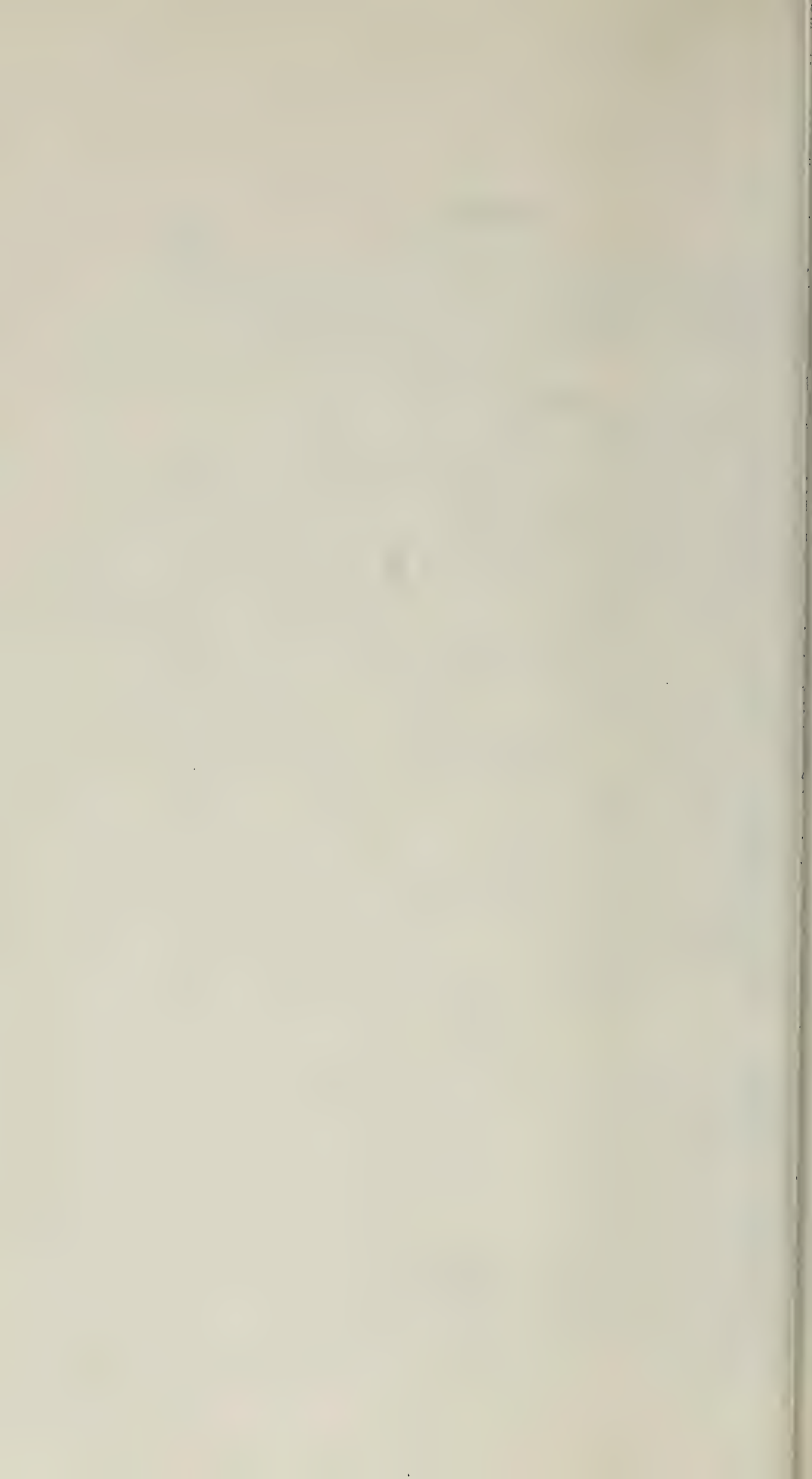
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JURISDICTION OF THE COURTS

The jurisdiction of the District Court is based upon 28 USC, Sec. 1331.

The jurisdiction of this Court of Appeals is based upon 28 USC, Sec. 1291, this being an appeal from a final judgment.

STATEMENT OF THE CASE

The parties own different tracts of land within Glacier National Park, deriving their respective ownerships from predecessors who homesteaded these lands prior to creation of Glacier Park in 1914. The action concerns a dispute over the rights to waters of a spring on a third tract of land, owned by the United States of America.

The appellant is the successor to her mother, Lydia Comeau, in ownership of her tract. In 1936, Lydia Comeau owned other lands in Glacier Park as well, and at that time she conveyed to the United States Lot 3 of Section, Township 33 North, Range 18 West. In the deed, it was agreed between her and the United States that she should have all water rights in the spring on Lot 3, including the right to place a dam or tank in the spring to store water, and a right of way for a pipe line to carry water to the tract now owned by Appellant. It was further agreed that the water right so provided should pertain only to the

This suit is the result.

We are now considering the appeal from an order of the lower Court dismissing the Complaint on the ground of lack of jurisdiction.

ARGUMENT

There is no diversity of citizenship. The alleged value of the water rights in excess of \$10,000.00 is open to question, nothing appearing beyond the bare statement. The rights of both parties originated prior to the creation of Glacier National Park, under Montana law, and the creation of the Park as a separate entity had no effect, adverse or otherwise, upon them. This was the reasoning upon which the dismissal order of the lower Court was based, and soundly and properly so. 16 U. S. C. Sec. 161: "Nothing herein contained shall affect any valid claim, location or entry existing under the land laws of the United States before May 11, 1910, or the rights of any such claimant, locator or entryman to the full use and enjoyment of his land."

The cases cited by appellant in her brief all appear to do with events and circumstances which arose following the acquisition of territorial jurisdiction by the United States, and involving a Federal question.

Opposed to this view are:

Mater v. Holley, 200 Fed. 2nd 123, and cases cited therein

C. R. I. & P. Ry. v. McGlinn, 114 U. S. 542

Jas. Stewart & Co. v. Sadrakula, 309 U. S. 94

Misner v. Cleveland Wrecking Co., 25 Fed. Supp.
763

In the C.R.I. & P. Ry. case cited above, the Court "declared the rule to be that when legislative power over territory is transferred from one sovereign to another, the then existing laws of the surrendering sovereign for the protection of private rights, so far as consistent with the laws of the new sovereign, continue in force until abrogated or altered by the new sovereign. This principle was there held applicable to the cession by a state to the United States of land for a military reservation such as is here involved. This assures that no area, however small, will be left without laws regulating private rights."

Where diversity of citizenship does not exist, jurisdiction of the district court can be sustained only on the ground that the case arises under the Constitution or laws of the United States; otherwise the bill must be dismissed. *Gustafson v. California Trust Co.*, 73 Fed. 2nd 765. In that case a cancellation of a contract for deed was sought, the land lying in the public domain of the United States. This alone was not sufficient to sustain federal court jurisdiction.

In *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 507, an adverse mining claim in federal court was dismissed in favor of an adverse decision on the same

state of facts in a state court. In the language of the court: This case "does not really and substantially involve a dispute or controversy respecting the validity, construction or effect of a federal law."

Federal Courts generally were admonished in *Poindexter v. Board of Supervisors*, 177 Fed. Supp. 852 that they should be zealous to avoid expansion of federal jurisdiction and should scrutinize carefully the pleadings and facts before assuming jurisdiction on the ground of an alleged federal question being involved.

To the same purport is the decision in *Tsang v. Kansas*, 173 Fed. 2nd 204, where the court dismissed a suit brought by an employe against his employer for Veterans benefits, after he had lost a suit on the same facts in the state court.

In *Brown v. City of Wisner, La.*, 122 Fed. Supp. 736, the court held that an incidental federal question is not an adequate basis on which federal jurisdiction may attach.

Still another decision to the same effect is *Central Ill. Pub. Service Co. v. City of Bushnell*, 109 Fed. 2nd 26, where a municipality proposed to erect a rival power plant with a grant of money under the Federal National Recovery Act, and the plaintiff sought to enjoin it. Said the court, dismissing the complaint at

p. 31: "The issue presented is strictly one involving a local question. In the absence of a substantial federal question the federal courts are neither required to consider local causes of action nor are they allowed to do so."

CONCLUSION

The appellees submit that this suit was improperly brought in the district court. There is no diversity of citizenship. No Federal or constitutional question is raised. No reason is advanced nor does any appear why resort was not first had to the state courts. The controversy is strictly local, between neighboring land-owners, and the mere fact its situs is in a national park does not create federal jurisdiction.

The appeal herein should be dismissed.

Respectfully submitted,
HAROLD F. SMITH
Attorney for Appellees

HAROLD F. SMITH
Office and P. O. Address
P. O. Box 731
Kalispell, Montana 59901

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Cir-

cuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD F. SMITH

Attorney for Appellees

IT IS HEREBY CERTIFIED that copies of this brief have been served upon James A. Cumming, Counsel for the Appellant, this 12th day of September 1967.

HAROLD F. SMITH

Attorney for Appellees

No. 22021 ✓

In the

United States Court of Appeals

For the Ninth Circuit

VITO J. LA TORRE,

Appellant,

VS.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, an unincorporated association; CALIFORNIA STATE COUNCIL OF CARPENTERS, an unincorporated association; BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, an unincorporated association; OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO, an unincorporated association; BUILDING AND CONSTRUCTION TRADES COUNCIL OF SANTA CLARA AND SAN BENITO COUNTIES, an unincorporated association; and STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, an unincorporated association,

Appellees.

Appeal from the United States District Court
for the Northern District of California

Appellant's Opening Brief

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No. 22021

In the

United States Court of Appeals

For the Ninth Circuit

VITO J. LA TORRE,

Appellant,

vs.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, an unincorporated association; CALIFORNIA STATE COUNCIL OF CARPENTERS, an unincorporated association; BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, an unincorporated association; OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO, an unincorporated association; BUILDING AND CONSTRUCTION TRADES COUNCIL OF SANTA CLARA AND SAN BENITO COUNTIES, an unincorporated association; and STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, an unincorporated association,

Appellees.

Appeal from the United States District Court
for the Northern District of California

Appellant's Opening Brief

JURISDICTIONAL STATEMENT

This is an appeal from judgments entered on February 28, March 2, March 8, and March 14, 1967, by the United States District Court for the Northern District of California, Southern Division, pursuant to an order entered on February 20, 1967, quashing service on certain defendants and denying plaintiff's motion to file an amended complaint to state the true names of defendants designated in the original complaint as Black Union, Blue Union, Red Union, Green Union, Brown Union and Yellow Union (R. 470-472). Plaintiff filed, on June 8, 1967, a timely Notice of Appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Plaintiff filed a complaint for damages for secondary boycott pursuant to Section 303 of the Labor Management Relations Act, 1947, as amended by the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 187), on January 30, 1962. Named as defendants were certain specified labor organizations (still parties to the case in the District Court) and six other labor organizations designated by fictitious names (R. 1). Plaintiff, at the time of the filing of the original complaint, did not know the true names of these six defendants and prayed for leave to amend his complaint to set forth the true names when they were ascertained (R. 3). Plaintiff had difficulty learning the names of those defendants because of prolongation of discovery procedures by other defendants. It is that prolongation that the District Court has given the defendants the advantage of in quashing service when they were finally identified and served.

On August 30, 1962, plaintiff received partial answers to interrogatories which included the names of approximately

thirty labor organizations, including five of the six appellees, in a context which made it impossible to ascertain what each organization's participation, if any, had been in the events alleged in the complaint. The name of the sixth defendant was mentioned in the balance of answers to interrogatories filed October 2, 1962, in a similar context (R. 55).

As of July 23, 1963, plaintiff, being still uncertain which organizations among the plethora named in the answers to interrogatories had actually participated in the events alleged in the complaint, filed a motion for an order to compel further answers (R. 78), which motion was granted on August 14, 1963 (R. 81). In the further answers (not filed until October 13, 1963) counsel for defendant Monterey County Building and Construction Trades Council included an insert which should have been included in the answers filed a year before (R. 89). This insert gave plaintiff its first confirmation that the Building and Construction Trades Department, AFL-CIO, (R. 91) the Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO, the International Hod Carriers, Building and Common Laborers Union of America, AFL-CIO, and the Building and Construction Trades Council of Santa Clara County (R. 92) had each been present *on its own behalf* at a meeting where some of the events alleged in the complaint occurred or were discussed. Prior mention of the two international unions had shown only that two of the twenty-one local unions which were members of the Monterey County Building and Construction Trades Council were affiliated with them (R. 38). Prior mention of the Building and Construction Trades Department, AFL-CIO, had shown only that defendant Monterey County Council and the Building and Construction Trades Council of Santa Clara County had charters

granting territorial jurisdiction to their respective areas from the national organization (R. 43).

Within three years after the filing of the complaint, to wit, on September 21, 1964, California State Council of Carpenters was served with summons and complaint, identifying it as Black Union named in the original complaint (R. 100). (This defendant's answer was filed December 3, 1964.) At the time of such service the information then available to plaintiff was used to attempt to obtain service on another of the defendants. However, the description which plaintiff had was so inadequate that only the California State Council of Carpenters could be served, the United States Marshal being unable to effect service on the other defendant because of the inadequate description (R. 212).

Because of the difficulty the marshal had, plaintiff sent more interrogatories to defendant Monterey County Council on September 16, 1964, in an attempt to discover the identity of persons attending a certain meeting pertaining to the events alleged in the complaint. Answers were filed to these interrogatories on November 25, 1964, but were unproductive of any information which would have enabled plaintiff to ascertain the identity or activities of undisclosed defendants (R. 102, 103).

Thereupon plaintiff promptly noticed oral depositions of four of defendant Monterey County Council's officers, which were taken on January 6, 1965 (R. 108, 111, 114, 117). Through these depositions, in combination with the previous answers to written interrogatories, plaintiff was able to identify the defendants with enough particularity for the marshal to effect service on them.

The remaining five defendants were served on the following dates: (1) Building and Construction Trades De-

partment, AFL-CIO — May 8, 1965 (R. 139); (2) State Building and Construction Trades Council of California — May 19, 1965 (R. 140); (3) Building and Construction Trades Council of Santa Clara and San Benito Counties — May 11, 1965 (R. 141); (4) Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO — May 20, 1965 (R. 142); (5) International Hod Carriers, Building and Common Laborers Union—May 7, 1965 (R. 143). These defendants were identified as Blue Union, Red Union, Green Union, Brown Union and Yellow Union, respectively.

After several months the defendants moved to dismiss on the grounds that the statute of limitations had run. The motion was denied on December 9, 1965, the District Court holding that “*in the present context*, the defense of the statute of limitations may more appropriately be asserted by answer than by motion to dismiss.” (Emphasis added.) (R. 247-248). *The District Court further specifically reserved the ruling on the statute of limitations defense until time of trial* (R. 248).

On January 17, 1966, the District Court refused to certify its order of December 8, 1965, to permit an interlocutory appeal to be taken, holding that there was no controlling issue of law involved, but merely an application of the “well-established rule that the application of the statute of limitations to a given case ought not to be decided on a motion to dismiss when such application raises factual issues.” (R. 299). Defendants then renewed their motion to dismiss in their Partial Pre-Trial Statement of November 25, 1966 (R. 316).

The District Court through another judge reversed itself by its order of February 20, 1967, quashing service of summons and denying plaintiff's motion to amend to identify

properly the fictitiously-named defendants on the ground that the statute of limitations had run before they were served (R. 470). It is from the judgments based on this reversal of the prior order that plaintiff appeals.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred by its order of February 20, 1967, in that the only proper remedy for defendants to pursue was a motion to dismiss for want of prosecution under Rule 41(b) instead of a motion for summary judgment.

2. The District Court erred by its order of February 20, 1967, in holding the action had never been "commenced" against these defendants.

3. Even if the statute of limitations were applicable, the District Court erred by its order of February 20, 1967, in that the issues considered were issues of fact which could be resolved only after trial.

4. The District Court erred by its order of February 20, 1967, and its order of April 26, 1967, in treating the California State Council of Carpenters, which had been served eight months earlier than the others and which had entered a general appearance by filing its answer, in the same manner as the other of these defendants.

QUESTIONS PRESENTED

1. Was a motion to dismiss for want of prosecution under Rule 41(b) the only available remedy for defendants?

2. Had an action been commenced against these defendants?

3. Were the issues which were raised issues of fact to be resolved only after trial?

4. Should the California State Council of Carpenters have been treated in the same manner as other defendants?

ARGUMENT**I. Rule 41(b) Provided the Only Remedy for Defendants.**

Federal Rule of Civil Procedure 41(b) states:

“For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him.”

This rule is the only rule applicable to what defendants allege that plaintiff has done, i.e., failed to prosecute, in this instance by not effecting service of process within a proper (but unspecified) time after the filing of the complaint. Defendants have simply misconstrued the statute of limitations and have failed to recognize the only procedure open to them. The statute of limitations concerns only the commencement of an action and is governed by Rule 3; it has nothing to do with the service of process. If defendants wish to seek relief on the ground that service of process was not effected within a proper time, Rule 41(b), which they have never invoked, is their sole remedy. They have mistakenly assumed that the statute of limitations has something to do with service of the summons, but it does not under the federal rules.

Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gas Co., 347 F.2d 921 (8th Cir., 1965), clearly holds that Rule 41(b) is the proper remedy to protect a defendant against any unreasonable delay in the service of process. The court stated at page 923:

“It appears to us that Rule 41(b) provides adequate protection against unreasonable delay in serving process or in prosecuting the suit.

If Rule 3 is read in connection with other rules, no support is found for defendant's position [reasonable diligence in obtaining service of process is required, in addition to the filing of a complaint, to toll the statute of limitations]. Rule 4(a) makes it the duty of the

clerk to issue summons forthwith after the filing of the complaint and to deliver process to the marshal for service. Rule 4(c) provides for service by the marshal. Thus the duties with respect to obtaining service are placed upon federal officials, not upon the plaintiff."

II. The District Court Erred by Its Order of February 20, 1967, in Holding That the Action Had Never Been "Commenced" Against These Defendants.

An action is commenced in a Federal District Court by the filing of a complaint. Nothing else is required. Federal Rule of Civil Procedure 3 states:

"A civil action is commenced by the filing of a complaint with the court."

In *Moore Co.*, *supra*, the court held that the filing of a complaint, without more, satisfied the burden of Rule 3. The court explained at page 922:

"Such rule in our view unmistakably states in plain, clear, well-understood and unambiguous language that an action is commenced by filing the complaint. The rule sets forth no additional requirements or conditions."

Support for this holding was found in the Rules Committee Notes, quoted by the court at page 923:

"When a *federal* or *state* statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limita-

tions. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising. Original Committee Note of 1937 to Rule 3, 2 Moore, Federal Practice §3.01[2].” (Emphasis added.)

While this particular case involved a federal statute of limitations, it is apparent from the quoted material from Original Committee Note of 1937 to Rule 3 that no distinction between federal and state statutes of limitations is to be made in this context. For other cases holding that federal law governs the issue of when a statute of limitations begins to run, see: *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959); *Isaaks v. Jeffers*, 144 F.2d 26 (10th Cir. 1944); *Gallagher v. Carroll*, 27 F.Supp. 568 (D.C.N.Y. 1939); *Krisor v. Watts*, 61 F.Supp. 845 (D.C. Wis. 1945).

In both *Gallagher* and *Krisor*, the courts held that the action was commenced within the limitations period by the filing of the complaint, even though there was no service of process until after the limitations period had expired. In *Gallagher*, as well as in the present case, the defendant attempted to rely on the proposition that a civil action is commenced by the service of summons. Defendant in *Gallagher* relied on New York Civil Practice Act, §218, which provides that a civil action is commenced by the service of summons. Defendants in this case attempt to rely on California Code of Civil Procedure, §581(a), which provides a three-year time limit for the service and return of summons. However, the court in *Gallagher*, in holding that federal law governed, specifically rejected defendant’s contention that service of process is required to commence an action in a federal court.

“The language of the Rule is too plain to admit of discussion or to leave any doubt that it was the purpose of the Supreme Court in reporting the Rules to Congress, and of the latter in sanctioning them, that an action should be deemed to have been commenced by the filing of the complaint; the issuance of the summons to the marshal was the required ministerial act of the Clerk; . . .” *Gallagher v. Carrol*, supra, p. 570.

Carvalho, et al. v. Doe, et al., 7 F.R.D. 469 (D.C. Hawaii 1947), was an action brought under the Fair Labor Standards Act against John Doe and Richard Roe, co-partners doing business in Hawaii under the name and style of Byrne Organization. The complaint was filed on November 15, 1945, and service was obtained two and one-half years later on one of the partners. The defendants claimed that the delay was unreasonable on its face, but the plaintiff did not find a partner in Hawaii when the complaint was filed. The main office of defendant was in Washington, D.C., and the Hawaiian office refused to reveal the names of the partners. Although one partner was in Hawaii for thirteen months of the period involved, and the plaintiff could have obtained the names of the partners from Washington, D.C., the court held that, with due diligence remaining in balance, and in the absence of a clear showing of the plaintiff's lack of diligence, Rule 3 would be literally applied, for as soon as the identity of a partner was revealed, the plaintiff transmitted the information to a marshal who made service. Similarly in this case when plaintiff was able to discover the identity of the fictitious defendants, plaintiff transmitted the information to the marshal who made service. It is therefore apparent that since the filing of a complaint “commences” an action in Federal court, the statute of limitations was satisfied by the filing of the complaint on January 30, 1962, well within the three-year period.

The reason given by Judge Wollenberg for his order of February 20, 1967, was in essence plaintiff's failure to effect service of process within three years from April 3, 1962. His finding that the defendants "would not have been put on 'notice' from the face of the original and first amended complaint that they were the 'fictitious' defendants named in those complaints" (R. 471) is irrelevant. They would have been put on such notice at the time of service by the summons itself identifying each of them as one of the "fictitious" defendants, just as California State Council of Carpenters was so put on notice (R. 100). The Court's statement that "(plaintiff) did nothing to bring them into the action until after the three-year limitation period" (R. 471, 472) is merely another way of saying that there was no service of process during that time. The timely filing of the complaint cannot be challenged.

If an action is not commenced by the filing of the complaint, without any consideration of a defendant's later actions, a premium is put on the ability of a defendant or group of defendants acting in concert deliberately to hinder and to obfuscate the discovery procedures. By that means a statute of limitations, designed to prevent plaintiffs from gaining an unfair advantage over defendants by not instituting action in time for defendant to preserve his evidence, would be perverted into a device encouraging one defendant to obstruct the orderly pre-trial exchange of information between the parties while the statute ran against another.

One of the issues of fact in this case which can be resolved only at trial is the exact nature of the relationship between Monterey County Building and Construction Trades Council and the fictitious defendants. If the facts at the trial show that the fictitious defendants actually knew of the

action by information received through defendant Monterey County Council and acted in concert with Monterey County Council to hinder discovery of their true identities, estoppel would prevent the defendants from pleading the statute of limitations. This rule is the same under both federal and California law.

Falk v. Levine, 66 F.Supp. 700 (D.C. Mass. 1946);

Armstrong v. Avco Mfg. Co., 137 F. Supp. 680 (D.C. Del. 1955);

R. J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963);

Estate of Pieper, 224 C.A.2d. 670 (1964);

Casey v. Anschutz, 252 A.C.A. 9 (1967).

III. Even if the Statute of Limitations Were Applicable, the District Court Erred by Its Order of February 20, 1967, in That the Issues Considered Were Factual and, Being Disputed, Should Be Resolved Only After Trial.

Although only defendant Building and Construction Trades Council of Santa Clara and San Benito Counties ever filed a motion for summary judgment (R. 149), since the motions to dismiss filed by the other defendants presented matters outside the pleadings, by way of affidavits, the motions were treated as for summary judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and were disposed of pursuant to Rule 56.

In the first order (December 8, 1965) the District Court stated:

"It appearing to the Court that, in the present context, the defense of the statute of limitations may more appropriately be asserted by answer than by motion to dismiss (citing cases);

IT IS ORDERED that the motions to dismiss be, and the same hereby are, DENIED;

IT IS FURTHER ORDERED that the affirmative defense of the statute of limitations may be asserted by said defendants and set forth appropriately in their answers herein, *with the ruling thereon reserved until time of trial.*" (Emphasis added.)

Defendants then moved, for the purpose of permitting immediate appeal pursuant to 28 U.S.C. 1292(b), that the District Court certify the following proposed order to the effect that it involved a controlling question of law as to which there was substantial ground for difference of opinion and that immediate appeal from the order might materially advance the ultimate termination of litigation. By its order of January 13, 1966, the District Court stated:

" . . . This court's order of December 8, 1965 did not involve such a question ['a controlling question of law']. The only legal principle involved in that order was the well-established rule that the application of the statute of limitations to a given case ought not to be decided on a motion to dismiss when such application raises factual questions. Since this court was, and is, of the opinion that the application of the three-year statute of limitations which is applicable herein does raise factual questions the motions to dismiss were denied, but defendants were explicitly left free to raise the statute of limitations as an affirmative defense at trial. This ruling clearly did not involve the kind of controlling question of law envisaged by §1292(b)."

After considering defendants' renewed motion to dismiss and plaintiff's motion to amend, the District Court then through another judge reversed itself by its order of February 20, 1967, on the ground that the statute of limitations had run (R. 470). Since defendants' renewed motion to dismiss was treated as a motion for summary judgment, as their initial motion to dismiss had also been treated, the

Court had to find beyond any doubt that no issue of fact had been raised by the pleadings and affidavits. To reach such a decision, the Court of necessity had to find beyond any doubt that every one of the following questions must be answered adversely to plaintiff:

1. Did plaintiff, in including fictitious defendants, do so because he had information and belief that other unions were involved but was then unable to state their identity?

2. Were the defendants who were served as fictitious defendants in fact those which plaintiff referred to in the complaint?

3. Were the defendants who were served as fictitious defendants undisclosed principals in the acts which are alleged to give rise to the cause of action?

4. Was the delay in service upon the fictitious defendants caused by delays on the part of the named defendants in complying with discovery, whether with or without the intention to frustrate identifying the fictitious defendants?

5. Was delay justified during the pendency of proceedings before the National Labor Relations Board and its defense of its order before the Court of Appeals?

6. Did defendants have actual knowledge of the filing of this lawsuit from a time shortly after the filing and service upon named defendants so that they suffered no genuine surprise or other prejudice by a delay in identifying them and serving them?

Each of these questions involves an issue of fact concerning which there is evidence to be produced which is not in the record. Only after hearing all the evidence could a court properly decide whether there was a lack of due diligence in prosecuting the case.

The Court, upon hearing the motions for summary judgment, was entitled to decide only questions of law. Summary

judgment could not properly be granted where the pleadings and affidavits showed a genuine issue as to any material fact.

Fountain v. Filson, 336 U.S. 681 (1949) ;

Gillis v. Miners and Merchants Bank of Alaska, 271 F.2d 163 (9th Cir. 1959) ;

Brauner v. Pearl Assur. Co., 267 F.2d 45 (9th Cir. 1958) ;

Koepke v. Fontecchio, 177 F.2d 125 (9th Cir. 1949).

Further, if there is even the slightest doubt that a factual issue has been raised, such doubt must be resolved against the moving party because summary judgment can be granted only when the moving party is entitled to judgment as a matter of law.

Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959) ;

Consolidated Elec. Co. v. U.S. for Use and Benefit of Gough Industries, Inc., 355 F.2d 437 (9th Cir. 1966).

Even had defendants used the proper remedy, i.e., Rule 1(b), the District Court would still have been faced with the necessity of a trial to determine these factual issues.

In its second order the District Court apparently relied on the fact that the last overt act of picketing occurred on April 3, 1962, for its determination that the statute of limitations had run (R. 470). *Defendants'* contention that January 30, 1962, the date of the filing of the original complaint, was the last date upon which any overt act causing damage could have occurred, was the only allegation of the date when the statute of limitations would begin which was before the District Court at the time of its first order of December 8, 1965. Thus, even though it was apparently

assumed that the limitations period began to run on January 30, 1962, the Court nonetheless in its first ruling denied defendants' motion to dismiss because a factual issue existed. It is therefore clear that the factual issue referred to by the Court in its first order (December 8, 1965) was defendants' alleged concealment of their activities, and not when the limitations period began to run.

In the context of the relationship among all of the defendants, the question of notice or knowledge of the true identity of the fictitious defendants is also clearly a question of fact. Judge Wollenberg, in overruling Judge Harris, based his finding that the statute had run on the ground that plaintiff "had notice of the existence of these new parties as far back as August, 1962, but did nothing to bring them into the suit until after the three-year limitation period" (R. 471-472). The facts do not support that finding in the unequivocal way required by law for the summary disposition of the issues without trial. For example, in answers to interrogatories Local Union No. 690 and Local Union No. 292 were said to be "*of* the Hod Carriers, Building and Common Laborers Union of America" and Local Union No. 337 was said to be "*of* the Operative Plasterers and Cement Masons International Association". The word "*of*" does not signify any particular relationship, but seems more likely to connote affiliation or membership as *descriptio personae* than a representative capacity.

The local unions mentioned in answers to interrogatories are but a few of the members of Monterey County Building and Construction Trades Council (R. 38). Building and Construction Trades Department, AFL-CIO, was said to have granted a charter to the Monterey County Building and Construction Trades Council, as well as to "the Building and Construction Trades Council with territorial juris-

fiction over Santa Clara County" (R. 43). These references also appear to be merely *descriptio personae*, without any hint of participation. State Building Trades Council was mentioned in a motion to send it a report on the proposals made by the Monterey Council (R. 48). Like the others, this showed no participation and could not reasonably have compelled plaintiff to become aware that it was one of the fictitiously named defendants.

Thus, while it is literally true that plaintiff had some scant "notice of the existence of these new parties as far back as August, 1962", it is immediately apparent from the context in which such notice appeared that it was notice of existence only, not of participation as principals. Knowledge of the existence of such organizations (which plaintiff had no need of answers to interrogatories to tell him) did not give any notice of the part any of the defendants played. This is particularly true of the two international unions mentioned only as organizations to which two of the twenty-nine members of the Monterey County Council also belonged. It would appear that in order for plaintiff to have been safe under the District Court's second order (R. 470-472), plaintiff would have had to name as defendants, in addition to the ten named defendants, the other thirteen members of the Monterey County Council, plus each International with which a Local on the list was affiliated, plus every other Local and International and inter-union councils mentioned in the Partial Answer to Interrogatories (R. 36-52), a total of some thirty-five organizations. Even this might not have exhausted the list. The District Court's second order would require completion of even more extensive discovery of a difficult nature before the action could be "commenced" as to these defendants. The alternative would be to name every labor organization which might possibly be related

to those identifiable with certainty at the outset — a procedure wholly inconsistent with the spirit of the federal rules.

IV. The District Court Erred by Its Order of February 20, 1967, and Its Order of April 26, 1967, in Treating the California State Council of Carpenters in the Same Manner as the Other Defendants.

Plaintiff received notice of this defendant's existence in October, 1962 (R. 55). Service of the summons and complaint identifying it as the Black Union named in the complaint was made on September 16, 1964, well within the three-year limitations period, regardless of when the cause of action accrued (R. 100). Defendant filed its answer on December 3, 1964, also within three years from the earliest possible date, thus eliminating any doubt as to whether or not it had "notice" that an action was being prosecuted against it (R. 104). The reason stated by Judge Wollenberg for refusing to allow plaintiff to amend the complaint to identify this defendant was lack of diligent prosecution by plaintiff "in that he had notice of the existence of these new parties as far back as August, 1962, but did nothing to bring them into the action until after the three-year limitation period." (R. 471, 472). Judge Wollenberg was mistaken. The statement is simply wrong. The facts are irrefutably to the contrary. California State Council of Carpenters was brought into the action through service of process within the three-year limitation period, and even filed its answer within that period. Whether or not Judge Wollenberg was right as to any other defendants, the judgment in favor of this one must be reversed. It had no basis whatsoever for its motion, but was erroneously lumped together with the others by the District Court.

CONCLUSION

Under Rule 3 the action in the instant case was "commenced" by the filing of the complaint on January 30, 1962. Defendants' misconceived arguments concerning the statute of limitations, and the District Court's adoption of them, ignore the only available remedy, a motion under Rule 41(b). If the motion were deemed to have been under that rule, the District Court erred by refusing to allow a trial on the factual issues of defendants' conduct. The same would be true if a motion for summary judgment had been appropriate. The statute of limitations is simply irrelevant to the timeliness of service of summons. The order of December 8, 1965, denying defendants' motion to dismiss and specifically reserving a ruling on the statute of limitations question should be followed.

The judgments should be reversed and the case permitted to go to trial, allowing the defendants who are appellees on this appeal (other than California State Council of Carpenters) to raise by answer the issue of due diligence in prosecution.

Dated, San Francisco, California, August 30, 1968.

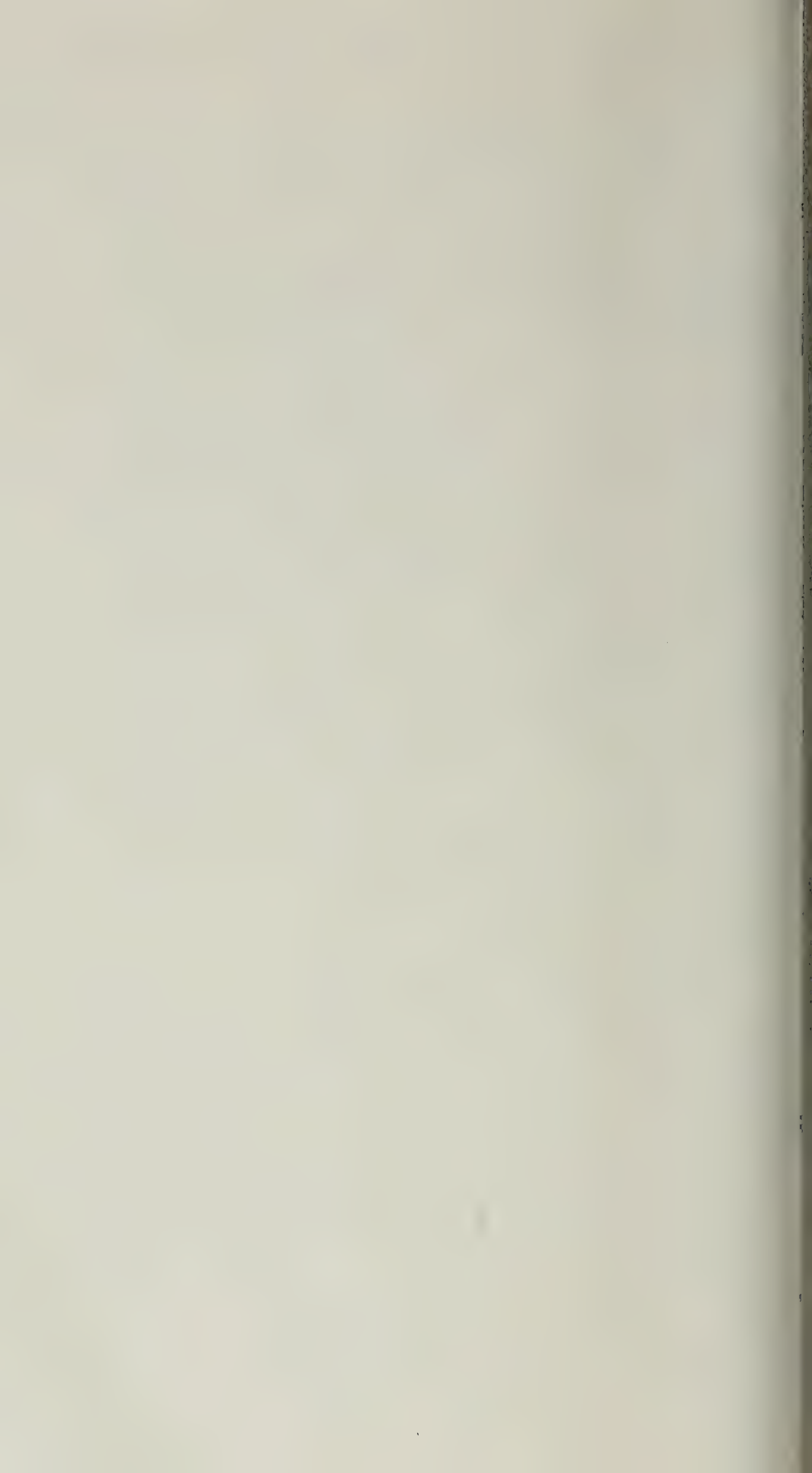
Respectfully submitted,

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No. 22023 /

United States
Circuit Court of Appeals
for the Ninth Circuit

RUDOLPH L. GROSS and CATHERINE D. GROSS,
Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Petition to Review a Decision of
The Tax Court of the United States

BRIEF OF PETITIONERS

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<i>Spreckels vs. Commissioner</i> , 5 TCM 49	1
<i>John M. Trent, et ux, vs. Commissioner</i> , 61-2 USTC 9506, 291 F2 669	1
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<i>A. J. Whipple</i> , 63-1 USTC 9466, 83 S.Ct. 1168	19-20-2

STATUTE

Sec. 166, Internal Revenue Code of 1954, Reg. 1, 165 (C) (1)	
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No. 22023

United States

Circuit Court of Appeals

for the Ninth Circuit

UDOLPH L. GROSS and CATHERINE D. GROSS,
Petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Petition to Review a Decision of
The Tax Court of the United States

BRIEF OF PETITIONERS

JURISDICTION

This appeal involves income taxes for the years 1958 and 1961. In 1961 Petitioners claimed a deduction for business bad debts in the amount of \$69,880.47 and carried the remaining business loss back to the year 1958. They thereafter received a carryback adjustment and refund of 1958 taxes. Respondent subsequently disallowed the business bad debt and based thereon determined deficiencies in income tax for

the years 1958, 1960, 1961. (Transcript of Record, Document No. 2, Exhibit A) There is no controversy here respecting the year 1960.

Pursuant to authority granted by Internal Revenue Code of 1954, Sec. 7442 (26 USC 7442), Petitioners timely petitioned the Tax Court of the United States for a redetermination. (Transcript of Record, Document No. 2) On 16 February, 1967, the Tax Court filed its Memorandum Findings of Fact and Opinion and based thereon entered its Decision for the Respondent. (Transcript of Record, Documents Nos. 11 and 12) Thereafter, on 18 May, 1967, Petitioners duly filed their Petition for Review by this Court. (Transcript of Record, Document No. 13) Jurisdiction is conferred on this Court by Internal Revenue Code of 1954 §7482 (26 USC 7482).

SPECIFICATIONS OF ERROR

The Opinion of the Tax Court (TCM 1967-31) is against the evidence and applicable statutory and case law as follows:

1. That the record falls far short of establishing Petitioners' loans were proximately related to any individual business they were carrying on. (TCM 1967-31, p. 8)
2. That Catherine D. Gross' advances to Union resulted in non-business losses since she was not engaged in any business in 1961. (TCM 1967-31, p. 9-10)

3. That the proof of the alleged loans and their relationship to an individual money lending business leaves much to be desired. (TCM 1967-31, p. 10)

4. That there are only three or four interest bearing notes . . . to witness the alleged money lending business. (TCM 1967-31, p. 10)

5. That the loans were certainly not made in a business-like manner; that there is a noticeable absence of the type of instruments and records usually found in the conduct of a business. (TCM 1967-31, p. 11)

6. That advances to North Bend Veneer Company, Winley Steel Erectors, Baby Furniture, Inc. and The Hitchhiker Corporation appear to be advances to equity capital rather than loans, and even if loans, they appear to be advances to enhance or protect an existing investment. (TCM 1967-31 p. 11)

7. That Gross was not in a separate business of promoting and financing ventures for gain . . . that the most that could be said of all such loans is that they were designed to aid businesses in which he was an investor. (TCM 1967-31, p. 12)

8. That loans made to Union Finance Company and loans to Union's customers were not proximately related to petitioner's business of being an employee of Union Finance Company. (TCM 1967-31, p. 12 and 13)

9. The Opinion is further in error in its failure to make a decision respecting Petitioners' allegations and testimony based on his oral Amended Complaint, of unclaimed business bad debts the worthlessness of which were discovered to have occurred during 1961.

STATEMENT OF THE CASE

A. Year of Worthlessness.

Petitioner, Rudolph L. Gross, worked in the finance industry from 1936 to 1961 (with the exception of the war years) with his experience concentrated on consumer loans (Tr. 14-16)

During the year 1950, Rudolph L. Gross, Catherine D. Gross and Burt Wilson, formed Union Finance Company, a Corporation, pursuant to the Oregon Small Loan Law. The parties subscribed and paid for the capital stock of the said Corporation as follows:

Burt Wilson	\$30,000.
Rudolph L. Gross	15,000.
Catherine D. Gross	15,000.

and the said investment represented adequate capital. (Stipulation, Paragraph 9, pg. 3; Tr. 16) (Tr. 17)

From time to time, until 1958, the stockholders made loans to said Corporation. These loans had no relationship to shareholdings; were interest bearing; were evidenced by

notes and were treated as loans on the corporate books. (Stipulation, Par. 11, pg. 4) The notes were subordinated to a credit line extended to Union Finance Company by the United States National Bank. (Stipulation, Par. 11 and Par. 12, pgs. 3 and 4)

The Corporation, from time to time, borrowed money from non-stockholder strangers up to a total of approximately \$60,000. (Tr. 20; Tr. 126; Exhibit 19-S, pg. 7)

Funds were loaned by Petitioners to Union Finance Company for the dual purpose of earning interest income and of providing the Corporation additional borrowing capacity. (Tr. 21) Interest was, in fact, timely paid by the Corporation to Petitioners. (Tr. 22; Exhibits 1-A, 2-B, 6-F, -G)

Profits earned and losses incurred by Union Finance Company from 1958 through 1961 were:

Calendar year 1958	(\$ 69,954.36)	Loss
Calendar year 1959	1,104.23	Income
Calendar year 1960	(66,588.32)	Loss
As at June 30, 1961	(110,246.73)	Loss
Calendar year 1961	(155,910.23)	Loss

Tr. 117-118)

Earned surplus (per books) in Union Finance Company, as at June 30, 1961, was (\$5,360.82), and as of December

31, 1961, was (\$51,024.32). Thus net stockholder equity as of December 31, 1961, was \$8,975.68. (Tr 116; Exhibit 19-S, pg. 9)

As of June 30, 1961, the Corporation owed the United States National Bank \$929,915.30, secured by notes, contracts and trust receipts due the Corporation from its customers, and also by the subordinated notes of Petitioner and Wilson. (Tr. 118, Stipulation, Par. 11 and 12, pgs. 3 and 4; Exhibit 19-S) Analysis of the true value of collateral pledged to the United States National Bank by the Corporation showed it did not adequately secure the bank obligation. (Tr. 119)

The Certified Public Accountants engaged by Union Finance Company were of the opinion that as of June 30, 1961, the Corporation was in "shaky" condition. (Tr. 117)

On or about May, 1961, Gordon Wilson, successor in interest of Burt Wilson, told Petitioner, Rudolph Gross that he wanted him to resign as Manager of the Union Finance Company. Gross refused, (Tr. 27-27) and on or about October 19, 1961, Gordon Wilson filed suit against Rudolph L. Gross and Union Finance Company, seeking receivership, accounting and injunction. Supporting said Complaint, Wilson, by Affidavit, swore, "The bank threatening to foreclose any security it holds. The financial condition of the Company is in grave doubt." (Stipulation of Facts, Par. 15, pg. 4; Exhibit 18-R) In connection with

the suit, a Receiver was appointed who thereafter excluded Gross from occupancy of the premises of Union Finance Company. (Stipulation of Facts, Par. 16, pg. 5; Tr. 27)

Based on his knowledge of the business losses and the filing of the lawsuit, Petitioner concluded prior to December 31, 1961, that he would not recover any of the amounts due him from the Corporation as evidenced either by stock or notes even though he filed claims therefor with the Receiver. (Tr. 28-29)

James Ross Nelson, of the Certified Public Accountants for Union Finance Company, and who prepared the 1961 individual income tax return for Petitioners, concluded that because of the loss history of the Corporation for several years, and because of disputes between the shareholders, and because of the inadequacy of the real value of collateral securing bank loans, the Union Finance Company was definitely under at not later than December 31, 1961", and that Petitioners, as creditors of the Company, had totally valueless notes as of that date. (Tr. 120-122)

Report of Receiver (filed March 7, 1962), which states the position of Union Finance Company as found by Receiver on the date he took over, indicates that of \$821,952.74 of receivables, \$324,886.09 were delinquent 90 days or over; that whereas the books indicated Dealer Reserves on hand provided collateral security of \$13,453.41, there was in fact

between June, 1960 and February, 1961, and aggregated \$3,402.40. Jack Finley was killed in the early spring of 1961, and the enterprise was abandoned. Petitioner made the loans fully expecting them to be repaid with interest or other financial gain. About one-half of these advances were repaid. (Tr. 37-41 incl.; Tr. 49; Tr. 132-133; Exhibit 43)

North Bend Veneer Co. was a corporation of which Petitioner and three others were equal stockholders. Each stockholder paid \$1,500.00 for his stock. North Bend was a customer of Union Finance, which made it equipment loans. From April, 1960 until June, 1961, Petitioner advanced working capital to North Bend. Twenty-eight such advances were made to an aggregate total of \$9,251.47. Petitioner intended these advances to be loans and they were so treated on the books of the Corporation. \$1,800.00 of the amounts advanced was recovered by Petitioner out of the sale of machinery which he acquired as security. Petitioner's records indicate that he borrowed money from the United States National Bank to provide working capital loans to North Bend. Petitioner assisted in the management of the company, but drew no salary from it. (Tr. 41-46; Exhibits 23, 45. Tr. 133-135)

Between 1958 and 1961, Petitioner made five separate loans aggregating \$875.00 to C. H. March. These loans were made to assist March in a dredging operation, and Petitioner

expected a profit on them. March, who also was a customer of Union, died in the spring of 1961. (Tr. 47-48; Exhibit 41)

Between January, 1960 and March, 1961, Petitioner made ten personal loans totalling \$475.00 to Jack Finley. This balance had been paid down to \$270.00 at the time of Finley's death in early 1961. (Tr. 48-49; Exhibit 42; Stipulation, Par. 4, 6, pg. 2)

Sam Osmundson was a used car man who worked for a dealer-customer of Union Finance. Osmundson wanted to go into business for himself, and Petitioner concluded that if he did he would be a customer for Union. Petitioner, therefore, loaned him \$535.00 for a lease deposit on a used car lot. The loan was represented by a check for \$35.00, and the balance by a demand note at 6% interest. Osmundson opened the car lot, but within 30 days, on or about October 1, 1961, disappeared, and, despite his efforts, has never been found by Petitioner. No part of the obligation was repaid, and no part thereof was deducted from income by Petitioner in 1961 or any subsequent year. (Tr. 50,51; Exhibit 36, 8-H, -I)

C. D. Kemp, dba Alpha Auto Sales, was a substantial customer of Union Finance Co. He had had a good credit experience with Union, but at the time of Petitioner's advances, it had started "getting weak". Petitioner loaned him \$3,400.00 on May 2, 1960, \$2,000.00 on March 24, 1961,

and \$3,500.00 on October 5, 1961. These loans were made, hoping to benefit the finance company, and with the agreement the funds would be returned with interest. Checks representing the advances were marked with the legend, "Loan" or "Car Advances". On October 4, 1961, Petitioner borrowed \$3,500.00 from the First National Bank and reloaned it to Alpha the next day. Alpha Auto Sales "went broke" in late 1961, owing Union Finance substantial balances, and owing Petitioner \$8,985.60. Despite efforts and demands by Petitioner, and subsequently by the Receiver for Union Finance Company, no recovery was or has been made by Petitioner or Union. The obligations to Petitioner were worthless at December 31, 1961. No part of them were deducted by Petitioner on his 1961 or any subsequent return. (Tr. 51-56; Tr. 58-59; Exhibit 38, 39, 20-T, 21-U, 2-B, 8-H, 9-I)

Toward the end of 1961, Union Finance Company was in serious difficulty and was becoming unable to pay its bills. Fred Marks convinced Petitioner he had Eastern money connections who would be willing to invest in or buy out Union. Petitioner advanced \$600.00 to Marks for expenses and loaned him an additional \$417.00 for the purpose of locating an investor or buyer. (Tr. 56-58; Exhibit 40)

Between February, 1960 and July, 1961, Petitioner made some twelve loans to Arthur W. Lehman, totalling \$1,295.00. These amounts are represented by checks bearing

the legend "Loan". Mr. Lehman was a customer of Union, and had been involved with Petitioner in North Bend Veneer Company. These advances were made for working capital for a logging venture Lehman was starting at North Bend, Washington. Lehman and Petitioner had an agreement the money would be repaid and that Petitioner, in addition, would receive an override on log sales as his profit on the advances. In the fall of 1961, Lehman defaulted on his repayments and Petitioner began making efforts to collect which are still unsuccessful. Petitioner has found a number of judgments and tax liens recorded against Lehman in King County, Washington, and determines the advances to have been worthless at the end of 1961. Petitioner did not deduct this loss in 1961 or any subsequent year. (Tr. 60-63, N.B. Tr. 61, line 1, "a note to ride" should read "override"]; Exhibits 2-B; 8-H; 9-I, Exhibit 34.)

Between May, 1957 and May, 1961, Petitioner made eighteen separate loans to L. W. Taylor, aggregating \$6,695.00, of these \$2,500.00 advanced May 7, 1957, and \$1,650.00 advanced May 1, 1961 were represented by demand notes bearing interest. The remaining advances were represented by checks substantially all of which bear the legend "Loan". Prior to his death in the early spring of 1962, Mr. Taylor had repaid most of these amounts with

interest. At the time of his death, Taylor had a remaining obligation to Petitioner in an amount not less than \$1,000.00. Taylor was a co-stockholder with Petitioner in North Bend Veneer and was a customer of Union Finance. Taylor died leaving no estate. (Tr. 63-66; Exhibit 35)

P. T. LaLonde was a customer of Union Finance, between September, 1956 and March, 1961, Petitioner made seven separate loans to P. T. LaLonde and/or D. M. LaLonde (his wife), totalling \$4,742.00. Of this amount, \$2,720.50 was represented by a note dated September 7, 1956 bearing interest at 10%, and the balance by checks. All of the loans to LaLonde were repaid. (Tr. 66-68; Exhibit 32)

On January 29, 1959, and on September 28, 1962, Petitioner made secured, interest bearing loans to F. D. Windsor totalling \$5,200.00. Both amounts were repaid. (Tr. 68-69; Exhibit 33)

Prior to April 2, 1962, Petitioner had made several loans to one Michael P. O'Brien. On April 2, 1963, these loans were consolidated into an installment note of \$1,100.00. Attempts to collect on this note, as well as attempts made in 1961 to collect on the underlying obligations, were and are fruitless. Petitioner believes the obligation to have been worthless at the end of 1961. (Tr. 69-71; Exhibit 25)

Petitioner made additional loans as follows:

<u>Borrower</u>	<u>Date</u>	<u>Amount</u>	<u>Secured</u>	<u>Repaid</u>
H. Keller	7/ 6/60	\$ 55.00	no	no
G. & L. Smith	6/11/50	3,500.00	no	yes
M. Bergdorf	5/ 1/59	50.00	no	yes
F. Patterson	11/22/60	35.00	no	yes
C. & B. Clinton	4/16/59	500.00	yes	yes
A. Burke	1/31/56	1,688.40	yes	yes

(Tr. 71-75, Exhibit 26-31 incl.)

During the year 1961, a Corporation called Baby Furniture, Inc. was formed with G. Graef, C. D. Kemp and Sandra Dutoit, each subscribing to 1/3 of the authorized stock. The stock of Sandra Dutoit was in fact paid for and held by Petitioner, but was issued to Dutoit as a nominee. The stock was beneficially owned by Petitioner. In addition to his investment, Petitioner made working capital loans to the company during 1961 in a total amount of \$7,854.95. Of this total, Petitioner borrowed \$6,000.00 from Leonard Moore and reloaned it to the corporation. During the year 1962, Petitioner made additional loans to the corporation in a total amount of \$1,216.75. Loans made to the corporation by Petitioner were properly reflected on its books as such. Baby Furniture, Inc. went out of business in 1962. At the time it went out of business, Petitioner took all remaining inventory into his possession, but was and has been unable to

dispose of it. The value of the inventory acquired by Petitioner did not exceed \$1,500.00. No other payments were made to Petitioner. The loans became worthless in 1961 and 1962. Baby Furniture, Inc. properly elected treatment under Sub-Chapter S of the Internal Revenue Code and for the calendar year 1961 suffered an operating loss of \$4,123.43. No put-through share of this loss was deducted either by Petitioner, nor by Sandra Dutoit. For the year 1962, Baby Furniture, Inc. suffered an operating loss in a minimum amount of \$3,231.52, no part of which was deducted by Petitioner or Sandra Dutoit. (Tr. 78-82; Tr. 127-131; Tr. 146; Tr. 148; Exhibit 24)

During 1960, Petitioner and P. T. LaLonde formed a corporation named "The Hitch-Hiker Co." It was capitalized for \$2,000.00. of which Petitioner paid cash for his 50% interest. Petitioner made additional loans to the company, properly identified on the corporate books as "Owing to Officer — R. L. Gross". Some of these loans were repaid from time to time. At the time the corporation was liquidated in 1961, it owed Petitioner \$487.62, no part of which was paid or collectible, and no part of which was or has been deducted by Petitioners.

In summary, during the period 1955 to 1962, Petitioner made 135 separate loans (exclusive of loans to Union Finance Company) to 22 borrowers in an aggregate amount

of not less than \$70,438.27. Twenty of the said borrowers were also customers of Union Finance Co.

SUMMARY OF THE ARGUMENT

Petitioner will argue:

A. Losses incurred by virtue of loans made to Union Finance Company were sustained during the year 1961.

B. Petitioners were in the trade or business of rendering services to a corporation for pay; of making loans; and of financing and promoting business opportunities.

ARGUMENT

A. Year of Worthlessness.

It must be assumed that Rudolph Gross was completely familiar with and aware of the financial position of Union Finance Company at all times. Not only was he the responsible managing officer, but stockholder dissidence impelled him to careful analysis of the company's condition during 1961. Thus, Mr. Gross was aware in the latter part of 1961, of those facts set forth by the Receiver early in 1962. He knew of the loss in portfolio value of the security behind consumer loans; the serious delinquency of a large percentage of loans outstanding; the concern of the United States National Bank as the company's provider of funds. Add to this the corroborative value of his testimony regard-

ing his personal loans made to Ros Morrison, Alpha Motor Sales and others, characterizing them as rescue loans made essentially for the protection of the finance company.

Who then, could realize better than he the worthlessness of the corporate notes which he, a stockholder, was holding. Who could know better that his position, because of subordination agreements, was junior to all obligations due the bank and that his position as managing shareholder of a corporation in receivership would doubtlessly be junior to third party strangers and certainly junior to Indian trust funds on time deposit with the finance company. Obviously, the claims filed by him with the Receiver were pro forma and forlorn and conceivably could have been made to maintain a state court record consistent with a presentation of his proper management of the company business.

Mere hope of future collection does not vitiate worthlessness.

Spreckels vs. Commissioner, 5 TCM 49 (Dec. 14.970 [M].)

B. Were Petitioners in a Trade or Business.

More germane to the problem herein is the classification of the loans made by Petitioner to Union Finance. As has been held in a line of cases typified by *John M. Trent, et ux, vs. Commissioner* (CCA2), 61-2 USTC 9506; 291 F 2 669; and *Leonard Lundgren and Evelyn Lundgren vs. Commis-*

itioner, 67-1 USTC 9389, 376 F 2 623, an employee of a corporation is in the business of rendering services for pay. Any loans made to the corporation in aid of this business activity, as distinguished from loans made to protect or enhance his position as an investor, are to be classified as business loans. As pointed out by this Court in *J. T. Dorniney*, 26 TC 940, a loan made by an individual related to his business, is a business loan whether or not the individual is also engaged in the business of lending money. The distinction between the business of rendering services to a corporation for gain and being a mere investor in a corporation is also implicit in the *Whipple* decision, "... when the only return is that of an investor the taxpayer has not satisfied his burden of demonstrating that he is engaged in a trade or business * * *". *A. J. Whipple*, 63-1 USTC 466.

Petitioner testified that at the time these loans were made, the company was completely solvent and profitable. The loans were not made to protect Petitioner's investment, nor, as additions to working capital, did they directly enhance it. The true effect of the advances was to give the company, by virtue of triple bank loan leverage thus obtained, the ability to earn more profit. This maneuver was that of an experienced employee engaged in his business of rendering services for profit.

In addition to the foregoing rationale, we must note

that Petitioner was earning and being paid 10% on these advances. As will be seen hereafter, the volume of Petitioner's activity in the lending of money was sufficient to give him the business status of a money lender.

That a series of isolated transactions do not constitute a trade or business is axiomatic. That "investing" is not a trade or business where the only return is in dividend income or gain in the value of the security has been established by the Supreme Court in *A. J. Whipple*.

Obviously, there can be no set number of transactions nor no set dollar value on volume which can be said to draw the line of demarcation. The intention of the lender as indicated by his continuity must be determinative. In *Hyman R. Minkoff vs. Commissioner*, 15 TCM 1404, where Petitioner made 40 odd loans in five years totalling some \$300,000, this Court found him to be engaged in the business of lending money. In *Allerton Cushman, et ux, vs United States, D.C. Ariz.*, 56-2 USTC 9689, it was found that where Petitioner made 21 loans totalling \$288,000 including several unsecured advances aggregating \$65,500 to one borrower, she was in the business of lending money. In *F. R. Ingram vs. Commissioner*, 20 TCM 1447, Petitioner was found to have been involved in the promotion and financing of some 20 ventures. This Court held him to be in the business of promoting and lending money to businesses

In *Alfred S. V. Carpenter vs. A. G. Erickson*, USDC, Ore. Civil No. 64-478 (June 20, 1966) it was conceded that plaintiff had financed at least seven corporations and individuals from 1955 through 1962. In each instance plaintiff had guaranteed bank loans ranging from \$7,500 to \$133,000 and had received a fee of $\frac{1}{2}$ of 1% of the loan balance per annum. Plaintiff had great wealth, the bulk of it having come from investments in IBM and other "blue chip" stocks. Judge Gus Solomon held that although plaintiff was admittedly an investor, he also was in the business of financing businesses by loaning money and credit and that the subject losses were business bad debts.

In the instant case, the record shows that Petitioner's entire business experience involved and was connected with the money lending business; that from 1955 to 1961 he had adequate time to operate continuously as a money lender for his own account; that his intention always was to obtain profit from the advancement of funds, regardless of the formalities of the transaction. Indeed, the amount of time spent by Petitioner in the making and collecting of his personal loans, was bitterly complained of in the Bill in equity filed by his co-stockholder in the Receivership matter. The record further shows that Petitioner made over 140 loans to some 25 entities during the period 1955-1962, which aggregated in excess of \$130,000. The volume of loan transactions being made by Petitioner, when noted by his

certified public accountant, resulted in his thereafter filing a Schedule 1040 C for the business of making loans.

Testimony adduced at trial indicated that virtually all the larger loans made by Petitioner were made for the purpose of creating new customers for Union Finance; in assisting weak obligors of the Finance Company to attain a better operation so as to secure the repayment of their loans to the Finance Company; to further finance Union customers who had reached their credit limit with the company. As we have noted in *J. T. Dorminey*, a loan made by an individual proximately related to his principal business activity is a business loan. This doctrine is affirmed in *Paul L. Kentes, et ux, vs. Commissioner*, 21 TCM 274 in which case Petitioner, a chicken rancher, loaned \$103,000 to a restaurant which purchased 40% to 50% of his production; in *Ray A. Myers, et ux vs. Commissioner*, 42 TC 195 in which Petitioner guaranteed performance by their land development corporation of its contract. Failure of performance by the corporation required completion by Petitioner giving rise (held the Court) to a debtor-creditor relationship between the corporation and Petitioner. Subsequent failure of the corporation to pay gave rise to a business bad debt; and, in *Loren A. Decker, et ux, vs United States*, (DC Iowa), 65-2 USTC 9600, wherein Decker, a freight line operator, purchased \$10,000 of the capital stock of a glass boat manufacturer and loaned it additional \$49,000 through

undry advances. The Court, citing *Whipple* and *Weddle vs. Commissioner* (CCA-2), 325 F2 849, found that the plans were more proximately related to the development of a new hauling business than to the protection or enhancement of Petitioner's investment, and held, with *Weddle*, that it affords for deduction that the creation of the debt should have been significantly motivated by the taxpayer's trade or business even though there was a non-qualifying motive as well.

Petitioners further contend that they are within the doctrines established in *Minkoff*, supra, and in *Otis Newell Elliott and Tacy M. Elliott vs. U.S.A.* USDA Ore. Civ. No. 6-345 (April 6, 1967) i.e., that losses sustained in "the business of seeking out business opportunities for financing and promoting" are business bad debts. In this case testimony adduced established that Petitioners actively participated in the financing and promotion for anticipated profit of Finley Steel Erectors; North Bend Veneer Co.; Baby Furniture, Inc.; and The Hitch-Hiker Co. and other unincorporated ventures.

Testimony and exhibits presented at the trial of this case adequately prove that Petitioner suffered additional losses during 1961 from worthless bad debts, and from participation in a Sub-Chapter S corporation which were not deducted in the year 1961 or any subsequent year. The character and extent of these losses should have been

determined so as to allow Petitioners any tax benefit therefrom to which they were entitled.

CONCLUSION

The sense of the law, the regulations and judicial interpretations require that bad debt losses sustained by mere passive investors who look to capital growth and interest or dividend return without effort on their part be treated as capital losses, but that bad debt losses sustained by one devoting substantial, continuing effort to the management of a loan portfolio; to the seeking, financing and promoting of business opportunities; or by one making a loan in aid of and related to his business are to be treated as ordinary business losses. The evidence and testimony in this case evaluated in the light of the statutory and case law demand that the Memorandum Opinion of the Tax Court of the United States be set aside, that judgment be given for Petitioners that bad debt losses sustained and deducted by them were business bad debts, and that the matter be remanded for further determination as to additional deductible business bad debt and other losses incurred by Petitioners in 1961 and by them not deducted.

Respectfully submitted,

DEAN M. ALEXANDER,

Attorney for Petitioners

APPENDIX A

Referenced to Transcript

	<u>Exhibit Number</u>	<u>Exhibit Identified</u>	<u>Exhibit Received</u>	<u>Exhibit Rejected</u>
petitioner	1A-21U	1A-21U	1A-21U	
petitioner	22-44	22-44	22-44	
petitioner	45	45	45	
petitioner	46	46		46
petitioner	47	47	47	
petitioner	48	48		48
petitioner	49	49	49	
respondent	V	V	V	
respondent	W	W	W	

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUDOLPH L. GROSS and CATHERINE D. GROSS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

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CITATIONS

Cases:

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<u>Lundgreen v. Commissioner</u> , 376 F. 2d 623 -----	14, 21, 24, 27, 28
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Cases (continued):

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Statutes:

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Miscellaneous:

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ON PETITION FOR REVIEW OF THE DECISION OF THE
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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court
(I-R. 23-35)^{1/} are not officially reported.

JURISDICTION

This petition for review (I-R. 37-39) involves federal income taxes for the taxable years 1958 and 1961. On May 20, 1965, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiency, asserting deficiencies in income tax in the aggregate amount of \$25,388.16. (I-R. 4-8.)^{2/} Within 90 days thereafter, on

^{1/} "I-R." and "II-R." references are to volumes I and II of the record on review.

^{2/} This amount includes a deficiency asserted for the year 1960 in the amount of \$1,686.81 which was paid by the taxpayers and is not in issue here. (I-R. 23.)

August 17, ^{3/}1965, the taxpayers mailed a petition (I-R. 1-9) to the Tax Court for a redetermination of the deficiencies asserted for the taxable years 1958 and 1961 under the provisions of Section 6213 of the Internal Revenue Code of 1954. The decision of the Tax Court was entered on February 16, 1967. (I-R. 36.) This case is brought to this Court by petition for review mailed on May 16, 1967 (I-R. 37-39) within the three month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Whether the Tax Court correctly ruled, on the facts of record, that taxpayers' losses from the nonrepayment of loans were not proximately related to any trade or business conducted by taxpayers as individuals and, hence, qualified only for the limited deduction for nonbusiness bad debts provided by Section 166 of the Internal Revenue Code of 1954.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 166 [As amended by Sec. 8, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606]. BAD DEBTS.

(a) General Rule.--

(1) Wholly worthless debts.--There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

^{3/} Under Section 7502 of the Internal Revenue Code of 1954, mailing is treated as timely filing.

(2) Partially worthless debts.--When satisfied that a debt is recoverable only in part, the Secretary or his delegate may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction.

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(d) Nonbusiness Debts.--

(1) General rule.--In the case of a taxpayer other than a corporation--

(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and

(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months.

(2) Nonbusiness debt defined.--For purposes of paragraph (1), the term "nonbusiness debt" means a debt other than--

(A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer; or

(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

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(26 U.S.C. 1964 ed., Sec. 166.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.166-5 Nonbusiness debts.

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(b) Nonbusiness debt defined. For purposes of section 166 and this section, a nonbusiness debt is any debt other than--

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(2) A debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

The question whether a debt is a nonbusiness debt is a question of fact in each particular case. The determination of whether the loss on a debt's becoming worthless has been incurred in a trade or business of the taxpayer shall, for this purpose, be made in substantially the same manner for determining whether a loss has been incurred in a trade or business for purposes of section 165(c)(1). For purposes of subparagraph (2) of this paragraph, the character of the debt is to be determined by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct in the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt comes within the exception provided by that subparagraph. The use to which the borrowed funds are put by the debtor is of no consequence in making a determination under this paragraph. For purposes of section 166 and this section, a nonbusiness debt does not include a debt described in section 165(g)(2)(C). § 1.165-5, relating to losses on worthless securities.

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(26 C.F.R., Sec. 1.166-5.)

STATEMENT

The facts as found by the Tax Court may be stated as follows:

Rudolph L. Gross and Catherine D. Gross are husband and wife and they reside in Portland, Oregon. Taxpayers filed their income tax returns for the periods here involved with the District Director of Internal Revenue at Portland. (I-R. 24.)

Rudolph L. Gross had some experience prior to World War II working for finance companies making consumer loans. After his discharge from the Navy in October 1945 he went to work for the United States National Bank in Portland in the Consumer Finance Department. In 1947 he left the bank and he and a man named White organized a company called Aero Credit Corporation engaged in the business of automotive and airplane financing. There were about 10 to 20 stockholders in this corporation. (I-R. 24.) In 1950

Gross decided to sell out his interest in the above corporation and organize a finance company in which he would be a larger owner. Accordingly, in 1950 he sold his stock interest in Aero Credit Corporation and that year he and Burt Wilson organized the Union Finance Company (hereinafter sometimes called Union), which was formed pursuant to the Oregon Small Loan laws and it engaged in the automobile financing business. (I-R. 24-25.) The parties subscribed and paid for the capital stock of the said corporation as follows (I-R. 25):

Burt Wilson	\$ 30,000
Rudolph L. Gross	15,000
Catherine D. Gross	15,000
	<u>\$ 60,000</u>

Wilson was not interested in operating the finance company as he was steadily employed as a manager of another firm in Portland, so Rudolph L. Gross was the managing officer of Union. In his income tax returns for the years 1959, 1960 and 1961 he reported salary received from the company in the respective amounts of \$24,000, \$24,000 and \$21,600. (I-R. 25.)

The Union Finance Company derived much of its financing by loans from the U.S. National Bank of Oregon at Portland, to which it discounted customers' contracts at a lower rate of interest than it charged the customers. From its inception, Union's stockholders made advances to the corporation and they were treated as loans and Union executed notes therefor bearing 8 percent or 10 percent interest but all such notes were subject to subordination agreements executed between the payees and the bank subordinating such notes to stockholders to the bank's loans. However, the stockholders' advances permitted the bank to enlarge the line of credit to Union. (I-R. 25.)

It is stipulated that of the \$69,880.47 claimed as bad debt deductions on their 1961 income tax return the sum of \$55,000 represented advances to Union and that Catherine Gross had advanced \$15,000 of said sum from her own funds which she had inherited and Rudolph had advanced the balance. The notes were subject to subordination agreements to the bank. (I-R. 25-26.)

Paragraph 4 of the stipulation of facts provides as follows (I-R. 16, 26):

4. Petitioners claimed the following advances as business bad debts in their income tax return for the taxable year 1961:

<u>Name</u>	<u>Amount</u>
Chester March	\$ 775.00
Jack Finley	240.00
Ros Morrison	8,884.73
Finley Steel Erectors, Inc.	2,165.44
North Bend Veneer, Inc.	2,815.30
Union Finance Company	55,000.00
	<u>\$ 69,880.47</u>

The Commissioner determined that advances to the Union Finance Company were nonbusiness bad debts which did not become worthless until 1962 and the other advances totaling \$14,880.17 were non-business bad debts in 1961, the deduction thereof being limited by Sections 1211 and 1212, 1954 Code, to \$1,444.33. (I-R. 26.)

Burt Wilson died in 1954 and his son and daughter-in-law, Mr. and Mrs. Gordon Wilson, inherited his interests. Union lost some \$69,000 in 1958 and it made only \$1,104.23 in 1959. It again lost in 1960 over \$66,000 and dissension developed between Gross and Gordon Wilson. In May of 1961 Gordon tried to get Gross to

resign from Union but Gross refused. A certified public accountant was engaged by the corporation in June of 1961 to examine its affairs. The accountant's report, which was not certified, showed Union owed the United States National Bank \$929,915.30 secured by notes, contracts and trust receipts due Union from its customers and also by the stockholders' subordinated notes. The report contains an analysis of the pledged collateral, and, with the assistance of management, some attempt was made to evaluate many items of the security given. The indication in the report is that the pledged collateral did not adequately secure the bank obligations. (I-R. 26-27.)

On or about October 19, 1961, Gordon Wilson filed suit against Rudolph L. Gross and Union Finance Company, seeking a receivership, accounting and injunction. Supporting said complaint, Wilson, by affidavit, swore, "The bank is now threatening to foreclose on the security it holds, that the financial condition of the corporation is in grave doubt." (I-R. 27.)

In connection with said lawsuit, a receiver was appointed who thereafter excluded Gross from occupancy of the premises of Union Finance Company. (I-R. 27.)

Union's income tax return for 1961 shows a loss of \$155,910.23 and as of December 31, 1961, the balance sheet of Union Finance Company showed a deficit of \$51,014.32, computed as follows (I-R. 27):

Assets	<u>\$ 835,028.31</u>
Liabilities	\$ 826,042.63
Capital stock	60,000.00
Earned Surplus	(51,014.32)
	<u>\$ 835,028.31</u>

The United States National Bank continued extending the line of credit to the receiver, who continued to conduct the day-to-day operations of the company. (I-R. 27.)

On June 4, 1962, the bank discontinued its line of credit to the corporation, which action precipitated the receiver's recommendation to proceed with a bankruptcy reorganization or liquidate. (I-R. 27-28.)

On June 18, 1962, the court ordered the corporation liquidated and, by December 21, 1962, its assets had been sold. (I-R. 28.)

With their joint income tax returns for 1960 and 1961 taxpayers filed Schedule 1040C purporting to show an independent business of Rudolph L. Gross of "Loans", with the business address the same as Union or his home. In the schedule for 1960 there is the report, without any itemization, of interest received in the total sum of \$3,862.39 and bad debts in the total sum of \$5,506.70 and the computation of loss from the purported business of \$1,644.31. In the said Schedule C for 1961, again, without any itemization, there is reported interest received in 1961 in the sum of \$3,696.96 and bad debts in the sum of \$69,880.47 and the resulting loss of \$66,183.51. The returns were made out by the

certified public accountant who was also the accountant for Union and had made the audit of Union in the summer of 1961. The return for 1960 appears to be undated but it is stamped received in the District Director's office at Portland on May 8, 1961. (I-R. 28.)

During the year 1961 Rudolph Gross was the holder of 3 unpaid notes representing loans he had made to the makers. One note was an unsecured note signed by Ros and Thelma Morrison. It was dated January 26, 1961, and in the amount of \$8,900, with interest at the rate of 8 percent. Morrison was a used car dealer and long-time customer of Union to which he owed money. The loan was to enable Ros to pay off another finance company and thus make the position of Union more solid. (I-R. 28.)

Another note was an unsecured demand note signed by Sam Osmundson for \$500, with interest at 6 percent, dated August 31, 1961. Osmundson had been an employee of a customer of Union engaged in the used car business and he wanted to go into business for himself. The loan was made in order to secure Osmundson as a customer for Union but it did not work out as he absconded shortly thereafter. (I-R. 28-29.)

The third note was a note for \$4,000, dated January 29, 1959, signed by F. Donald and Rosemary K. Windsor payable \$2,000 on January 29, 1960, and \$2,000 on January 29, 1961, with interest at 7 percent. The note was secured by a mortgage executed by the Windsors on their home. (I-R. 29.)

Taxpayer Rudolph Gross had loaned money in years prior to 1961 to other individuals on their promissory notes. He loaned \$2,720.50 to Peter LaLonde on a note executed by Peter and his wife Delora M. dated September 7, 1956, with interest at 10 percent per annum after maturity and the note was made payable in 24 monthly installments. The note was paid in full. (I-R. 29.)

Another such note is a \$35, 30-day, 6 percent note signed by Frank G. Patterson which is dated November 22, 1960, and it is marked paid. (I-R. 29.)

Gross made some other advancements or payments that are represented here by his canceled checks to Arthur Lehman, Clarence and Buelah Clinton, Mary Bergdorf, Harold Keller, Gerald and Lueen Smith, L. W. Taylor, Michael P. O'Brien, Baby Furniture, Inc., North Bend Veneer Company, Hitch Hiker Company, Finley Steel Erectors, Inc., Jack Finley, C. H. March, Fred Marks, Alpha Auto Sales and C. D. Kamp. The dates on the checks range from 1957 to 1962 and some of them bear the legend "loan". The checks were generally to customers of Union or to other corporations in which Gross had a substantial stock interest. There is also Gross' canceled check to Union Finance Company dated March 7, 1958, bearing the legend "Loan to Union Finance." Taxpayers amended their petition at the trial to seek an increased business bad debt deduction in 1961 in the amount of approximately

\$30,000, based on the foregoing payments or advancements, represented by his canceled checks, being loans and some of them becoming worthless in 1961, and therefore business bad debts.

(I-R. 29-30.)

On their income tax returns for the taxable year 1961, the taxpayers claimed business bad debt deductions in the total amount of \$69,880.47. (I-R. 23-24.) The Commissioner in his statutory notice of deficiency (I-R. 4-8) disallowed the claimed deductions in their entirety. The taxpayers filed a petition with the Tax Court for a redetermination of the deficiencies asserted by the Commissioner. (I-R. 1-8.) The Tax Court denied the taxpayers' claimed business bad debt deductions in their entirety. (I-R. 35.) From that action the taxpayers have filed and prosecuted the instant petition for review. (I-R. 37-39.)

SUMMARY OF ARGUMENT

The question is whether the losses which taxpayer sustained from the nonrepayment of advances to his finance corporation and its customers were fully deductible as business bad debts, incurred in a business or businesses conducted by him individually, or were deductible only as nonbusiness bad debts incurred in aiding the corporation's business and protecting his investment therein. Taxpayer contends that the losses were incurred in his separate business or businesses of money-lending, promoting and financing corporations, and rendering services for pay as a salaried officer of his corporation.

The record amply and affirmatively warrants the Tax Court's findings that taxpayer was not engaged in a separate business of money-lending or of promoting and financing corporations; that his advances were not made to protect his employment; and that, in fact, his advances were made as a stockholder to aid the corporate business and protect and enhance his investment.

Taxpayer's money-lending activities were confined, save in a few instances, to advances to his finance corporation and its customers and ceased when the corporation went into receivership. Taxpayer himself testified that all his advances to individuals were made to secure new customers or strengthen existing customers of the finance corporation; and, generally, that his advances to both the corporation and its customers were made to protect his investment in the former while earning interest. He did not testify, nor is there a scintilla of evidence to show, that he made advances to protect his employment. And as for interest, he failed to show that his advances to customers were interest-bearing. The few advances he made to enterprises other than his finance corporation were to ventures in which he also had an investment to protect.

The Tax Court applied the proper criteria, under decisions of this Court and other appellate courts, in ruling that taxpayer's losses were from nonbusiness bad debts, and its decision should be affirmed.

ARGUMENT

THE TAX COURT WAS AMPLY WARRANTED BY THE RECORD IN RULING THAT TAXPAYERS' LOSSES FROM THE NONREPAYMENT OF LOANS WERE NOT PROXIMATELY RELATED TO ANY TRADE OR BUSINESS CONDUCTED BY TAXPAYERS AS INDIVIDUALS AND, HENCE, THAT SUCH LOSSES QUALIFIED ONLY FOR THE LIMITED DEDUCTION FOR NONBUSINESS BAD DEBTS PROVIDED BY SECTION 166 OF THE 1954 CODE

A. Introduction.

Section 166 of the Internal Revenue Code of 1954, supra, authorizes the deduction of bad debt losses. There is no limitation on the right of corporations to deduct all worthless debts in computing taxable ordinary income. This right is also conferred on individual taxpayers with respect to business bad debts. But with respect to individuals' nonbusiness bad debts, Section 166(d)(1) authorizes only a short-term capital loss deduction.^{4/}

Section 166(d)(2) defines a nonbusiness debt as any debt other than "a debt created or acquired * * * in connection with a trade or business of the [individual] taxpayer," or "a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business." The underlying provisions of Treasury Regulations on Income Tax (1954 Code), set forth in Section 1.166-5(b), supra, provide in pertinent part that:

The question whether a debt is a nonbusiness debt is a question of fact in each particular case. * * * the character of the debt is to be determined by the relation which the loss resulting from the debt's

^{4/} Under Section 1211(b) of the Code short-term capital losses are deductible only to the extent of capital gains plus \$1,000 of ordinary income. However, any remaining losses may be carried over for the next five taxable years, as provided in Section 1212 of the Code.

becoming worthless bears to the trade or business of the [individual] taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, * * *.

In short, an individual taxpayer is entitled only to a short-term capital loss deduction unless he shows that he has sustained a bad debt loss in a trade or business which he has conducted as an individual. And such a loss is not incurred in an individual's trade or business unless it is proximately related to such trade or business. Section 1.166-5(b)(2), supra; United States v. Keeler, 308 F. 2d 424 (C.A. 9th); Weddle v. Commissioner, 325 F. 2d 849 (C.A. 2d). Whether a particular loss or expense is incurred in a taxpayer's trade or business is a question of fact in each particular case, subject to statutory criteria. Lundgreen v. Commissioner, 376 F. 2d 623 (C.A. 9th).

In the case at bar taxpayers contend (Br. 18-24) that they sustained fully-deductible business bad debt losses from the nonrepayment of loans which were proximately related to one or another of three businesses which, it is alleged, the taxpayer Rudolph L. Gross (hereinafter "the taxpayer"^{5/}) conducted as an individual: (1) A business of loaning money; (2) A business of

^{5/} There is nothing in the record to indicate, nor do taxpayers contend on appeal, that the taxpayer Catherine D. Gross, Rudolph's wife, was engaged in any trade or business during the taxable years. Thus references hereinafter to "the taxpayer" relate both to the alleged individual businesses and to the contentions raised by husband and wife on appeal. As noted by the Tax Court (I-R. 32), the single loan made by the wife (\$15,000 to Union Finance) was properly treated, in any event, as a non-business bad debt.

financing and promoting corporations for gain; and (3) A business of being a corporate employee.^{6/}

In weighing these contentions it should be noted, at the outset, that the courts are in general agreement as to the tests for determining whether an individual's activities constitute a separate trade or business for tax purposes. The individual taxpayer must be regularly and actively engaged in activities from which he hopes and intends to realize a profit. Hirsch v. Commissioner, 315 F. 2d 731 (C.A. 9th); United States v. Henderson, 375 F. 2d 36 (C.A. 5th), certiorari denied, November 14, 1967 (36 U.S. Law Week 3200). Moreover, because the business of a corporation is distinct from that of its shareholders, a shareholder's services to his corporation do not necessarily constitute a separate trade or business. "Devoting one's time and energies to the affairs of a corporation is not of itself, and without more, a trade or business of the person so engaged. * * * investing is not a trade or business and the return to the taxpayer though substantially the product of his services, legally arises not from his own trade or business but from that of the corporation."

Whipple v. Commissioner, 373 U.S. 193, 202.

Finally, in order to claim a business bad debt deduction under Section 166, the individual taxpayer must establish not only that he

^{6/} For the purposes of this appeal, it is assumed, as the Tax Court was inclined to conclude (I-R. 30), that the loans to the corporation became worthless in 1961.

is in a trade or business but that the bad debt losses were proximate, related to that business. Whipple v. Commissioner, supra, p. 202; Weddle v. Commissioner, supra.

In Hirsch v. Commissioner, supra, having held that the individual taxpayer involved had failed to prove that he had incurred bad debt losses in his own trade or business, this Court emphasized in closing that (p. 738):

This Court has repeatedly stated the fundamental rule that in reviewing a decision of the Tax Court, the Court of Appeals is "not accorded the right to retry the issues de novo on the record and we must affirm unless the Tax Court decision was arrived at through plain error. * * * To reverse [a decision of the Tax Court] we must find that it is clearly erroneous, in other words, that the taxpayer's evidence so clearly showed the Commissioner to be wrong that the decision in the Commissioner's favor was palpably in error." Young v. C.I.R., supra. [268 F. 2d 245].

In the case at bar, we submit, the Tax Court was amply warranted by the record in ruling that the taxpayer's bad debt losses were not proximately related to any trade or business conducted by the taxpayer as an individual and, hence, were deductible only to the limited extent permitted in the case of nonbusiness bad debts.

B. The Tax Court correctly found that the bad debt losses were not incurred in a loan business conducted by the taxpayer as an individual

Taxpayer contends (Br. 21) that from 1955 to 1961 he was "a money-lender for his own account," and that his bad debt losses in 1961 were incurred in his separate loan business. The record does not bear him out.

From 1950, when Union Finance Company was organized, through most of 1961, taxpayer was a stockholder and the managing officer of the corporation. (I-R. 24-27.) During the period from 1955 to 1962, taxpayer advanced a total of about \$130,000 to about 25 individual and corporate parties. (I-R. 32.) Save for the advances to Union Finance and a few individuals, which were reflected in notes, the only evidence in the record of the claimed advances to the other individual and corporate parties consists of canceled checks, some bearing the legend "loan" and some not. The payees of these checks were generally either customers of Union Finance or other corporations in which taxpayer had a substantial stock interest. (I-R. 25, 28-30.) The bulk of the bad debts claimed on taxpayer's 1961 return consisted of advances to Union Finance. (I-R. 26.)

We submit that the Tax Court correctly found (I-R. 32-34) that in 1961 taxpayer was not in a private money-lending business separate from Union Finance's money-lending business. Commonsense tests for determining whether a stockholder has advanced money to his corporation in the course of a private money-lending business are set forth in United States v. Henderson, supra. There the Fifth Circuit, in rejecting such a contention, concluded (375 F. 2d, p. 41) that "the indicia of a genuine loan business were absent," citing inter alia the facts that: (1) Aside from the taxpayer's loans to her corporation, only one was interest-bearing; (2) Neither taxpayer nor any employee of hers devoted a

significant amount of time to making or servicing the loans;
(3) Taxpayer did not treat her lending activities as a separate business by maintaining separate books of account or a separate office, or by advertising; and (4) Most of the loans were to social or business acquaintances.

In short, the Fifth Circuit assessed the claimed business activities in terms of substantiality, profit motive and, in general, the usual hallmarks of a genuine commercial enterprise. This Court, too, has stressed the importance of substantiality and a profit motive. Hirsch v. Commissioner, 315 F. 2d 731.

In the case at bar, it is evident on all counts that the taxpayer was not engaged in a private business of lending money to the general public for a profit. The bulk of his advances were to Union Finance or customers of Union Finance, and most of the other advances were to corporations in which he had a substantial stock interest. Moreover, 25 lending transactions over a five or six year period cannot be equated with a regular and substantial line of activities.

Nor does the record show that taxpayer conducted his lending activities as a genuine commercial enterprise, for a profit and with the appropriate separate records and accounts. During the years in question, only a few of the advances to parties other than Union Finance were reflected in interest-bearing notes.

(I-R. 32.) As to the rest of the advances, reflected in canceled

checks, there was no clear evidence that any interest was charged; indeed, taxpayer's memory of these transactions was extremely vague. He could remember nothing about some and could only hazard a guess as to the amount due him. (I-R. 33.)

In his returns for the years 1958-1961, taxpayer reported interest income ranging from about \$3,700 to \$6,900 per year. However, the interest of his loans to Union Finance would account for most of these sums. (I-R. 33.) The interest reported for 1960 and 1961 was substantially exceeded by the claimed bad debt losses. (I-R. 28.)

In almost every instance, the advances to parties other than Union Finance were to substantial customers of Union Finance who were in financial distress. The few advances to corporations other than Union Finance in which taxpayer was a stockholder would appear to be advances of equity capital rather than loans, and even if they were loans, they would appear to be made to enhance or protect an existing investment. (I-R. 33.)

The taxpayer's own testimony as to the manner in which the advances were handled is indicative of the absence of business-like arm's-length dealing (II-R. 101-102):

Q. Almost all of the transactions we were talking about yesterday, your own private transactions, are evidenced only by a check.

A. That is correct.

Q. Occasionally there is a note but primarily they are checks?

A. That's true.

Q. You have been in this business for a long time. Now, how is it that you didn't take a note or any security in these transactions generally?

A. Well, I knew all these people pretty well and they said I will pay you back so I said O.K. and I gave them a check to help them out.

Q. Now did you know when there was no note how much interest you would get?

A. How did I know?

Q. Yes.

A. When I got the money back I would say you owe me interest for this amount.

Q. How much would that interest be?

A. Well, we would agree upon it at the time.

In sum, the record falls far short of showing that taxpayer was in a separate business of money-lending in 1961 or any other year; rather, it appears quite clearly, as the Tax Court concluded (I-R. 33), that the great majority of his advances were made as a stockholder in Union Finance and other enterprises, to enhance or protect an existing investment. Indeed, taxpayer himself concedes on brief (p. 22) that "virtually all the largers loans" were made to secure new customers for Union Finance or to strengthen the position of existing customers, sometimes to insure repayment of their loans to the corporation. Such advances were obviously in aid of the corporation's business and good will.

This Court's recent decision in Lundgreen v. Commissioner, 376 F. 2d 623, provides a useful contrast. There the court held inter alia on undisputed facts that the taxpayer's bad debt losses from nonrepayment of advances to one of his corporations were proximately related to his separate business of selling timber. That ruling was based on a number of factors not present in the instant case. The taxpayer as an individual had been in the business of selling timber before the corporation involved (RushMore) was organized, and continued selling timber to his various corporations and other parties both during RushMore's short corporate life and thereafter. In the case at bar, taxpayer's money-lending activities were mainly confined to advances to Union Finance and its customers, and terminated when Union Finance went into receivership in 1961. As the Tax Court noted (I-R. 31): "There seems to be no contention that this private loan business existed prior to 1955 and Gross testified flatly that it did not continue after 1961."

There were other significant facts in Lundgreen which distinguish it from the instant case. It was stipulated in Lundgreen that the taxpayer did not organize RushMore with the intent of receiving dividends or selling the stock at a profit. And the taxpayer gave undisputed testimony that his purpose in forming RushMore was to realize gain through sales of timber to the corporation and receipt of a salary for his services to it.

On such a record, the Whipple decision was inapplicable since the evidence (particularly the stipulated facts) precluded any conclusion that the taxpayer made his advances to RushMore qua stockholder, to protect and enhance his investment.

C. The Tax Court correctly found that taxpayer's bad debt losses were not incurred in a separate business of promoting and financing incorporated and unincorporated enterprises

Seeking a further business context for his bad debt losses, taxpayer contends (Br. 23) that his losses were incurred in a separate business of promoting and financing business ventures.

However, the record shows that taxpayer made advances to only four enterprises other than Union Finance, and that he had an investment stake in each of these enterprises, as in Union Finance. (I-R. 34.) The Tax Court concluded (I-R. 33) that the advances to such enterprises, if not equity capital, were made to enhance or protect taxpayer's investments and (I-R. 34) to aid the businesses of those enterprises, and that such advances did not place him in a separate business of promoting and financing business ventures. These conclusions are supported and, indeed, required by the Supreme Court's recent decision in Whipple v. Commissioner, 373 U.S. 193.

In Whipple the taxpayer engaged in far more diversified and extensive activities in promoting business ventures than did the taxpayer in the instant case. The taxpayer in Whipple was an incorporator and stockholder at different times in at least

twenty different corporations. As to twelve of these corporations, he promoted them for a time and then sold his interests in them. He also bought and sold land, acquired and disposed of a restaurant and participated in several oil ventures. The Supreme Court held, nevertheless, that the foregoing activities on the part of the taxpayer, qua investor, did not constitute a separate business.

The court held that (373 U.S., p. 202):

Though such activities may produce income, profit or gain in the form of dividends or enhancement in the value of an investment, this return is distinctive to the process of investing and is generated by the successful operation of the corporation's business as distinguished from the trade or business of the taxpayer himself.

In so holding, the court acknowledged that an individual taxpayer might be in a separate trade or business of promoting corporations for a fee or commission, or of developing corporations as going businesses for sale to customers in the ordinary course. Neither situation being present, the court held that the taxpayer's losses from advances to one of his corporations were losses from nonbusiness bad debts.

Similarly, in the case at bar, there is no evidence or contention that taxpayer was in the business of promoting corporations for a fee or commission in the ordinary course. The record shows only that taxpayer made advances to Union Finance and four other enterprises in which he had an investment stake. The Tax Court was amply warranted, then, in concluding (I-R. 33-34)

that such advances were made to enhance or protect taxpayer's investments and aid the businesses in which he was an investor--not loans in the course of a separate business of promoting and financing business enterprises.

- D. The Tax Court correctly found that none of the bad debt losses were proximately related to the taxpayer's status as a salaried officer of Union Finance

Decisions of this Court and other appellate courts have held that a salaried corporate officer is in a separate trade or business of rendering services for pay, for the purposes of Section 166.^{7/} But those decisions have by no means treated salaried corporate officers as automatically entitled to business bad debt deductions with respect to advances to their corporations; they have recognized and applied the requirement that a bad debt loss must bear a proximate relation to the individual's trade or business in order to qualify as a fully-deductible business loss. Lundgreen v. Commissioner, 376 F. 2d 623; and e.g., Kelly v. Patterson, 331 F. 2d 753; Weddle v. Commissioner, 325 F. 2d 849 (C.A. 2d); Trent v. Commissioner, 271 F. 2d 669 (C.A. 2d). It is useful to consider circumstances in the foregoing decisions

^{7/} In Whipple, although the Supreme Court recognized by dicta that an individual may promote corporations for a fee or commission, or for sale in the ordinary course, it reserved judgment on the correctness of decisions holding that a salaried corporate executive is in a separate trade or business of rendering services for pay.

which impelled the courts to the conclusion that the requisite proximate relation was present.

Trent, the earliest of these decisions and a landmark case, involved a taxpayer who was employed by one of two affiliated corporations on certain express conditions, including the requirements that he purchase one-third of the stock of the other corporation and that he make loans to both companies until their financial condition improved. After making eleven loans to the corporations, taxpayer balked at making a further requested advance and was fired. The taxpayer claimed business bad debt losses from the nonrepayment of the loans. The Tax Court ruled that the loans, made for the undisputed purpose of protecting the taxpayer's employment, were not incident to a separate trade or business. The Second Circuit reversed and held that, under the circumstances, taxpayer's bad debt losses were proximately related to his separate trade or business of rendering services for pay and therefore fully deductible.

As noted, the taxpayer in Trent was a minority stockholder. In Whipple, the Supreme Court reserved judgment on the correctness of Trent, but pointed to the problem of proof in a case involving a larger stockholder (373 U.S., p. 204):

Moreover there is no proof (which might be difficult to furnish where the taxpayer is a sole or dominant shareholder) that the loan was necessary to keep his job or was otherwise proximately related to maintaining his trade or business as an employee. Compare Trent v. Commissioner, supra. (Emphasis supplied.)

Shortly after Whipple was decided, the Second Circuit decided Weddle v. Commissioner, 325 F. 2d 849. There the taxpayer was controlling stockholder, president, general manager and a director of a corporation. As president and general manager she received a salary. She guaranteed loans to the corporation and, on its insolvency liquidation, paid the portion of the loans not covered by the corporate assets. She then claimed a business bad debt deduction for the amount so paid, invoking Trent. In the majority opinion the Second Circuit distinguished Trent as a case where there was no real dispute that the loans were made to protect the taxpayer's employment. And it agreed with the Tax Court that the taxpayer had failed to prove that protection of her employment had been a significant motivation for endorsing the notes. However, by way of caveat, the majority took the position that a corporate employee is also a controlling stockholder might be able to prove that protection of employment was a significant motivation, and that proof thereof (whether or not it was the primary motivation) would be sufficient to establish the requisite proximate relation of a bad debt loss to the taxpayer's business as employee. See also Millsap v. Commissioner (C.A. 8th), decided January 2, 1968. Ch. Judge Lumbard, concurring in Weddle, took issue with the majority's significant motivation rationale, saying (p. 852):

Where a corporate employee and stockholder makes loans to the corporation two fundamental motivations will inevitably be involved, that of protecting the taxpayer's investment in the corporation and that of protecting his salary interest. Unless the salary

interest is so small as to be of negligible value its preservation will surely weigh in the mind of the taxpayer in advancing monies to the corporation. Consequently, to measure the proximate-ness of the relationship between the loan and the taxpayer's status as a corporate employee by asking whether the latter provides a "significant" -- although not the dominant -- motivation is to pose a question which invariably will be answered in the affirmative.

We submit that Judge Lumbard's reasoning is cogent and sound, and that the majority's significant motivation rationale trenches on the Supreme Court's decision in Whipple. The Fifth Circuit has ostensibly avoided taking sides in Kelly v. Patterson, 331 F. 2d 753, where it denied the business bad debt deduction claimed by a stockholder and salaried corporate employee with respect to loans he had made to his corporation. The court said (p. 757):

Mr. Kelly was the controlling stockholder with a substantial investment in the corporation as compared to the salary received. The proof falls short of showing the loans to have been proximate to his business of being an employee of the corporation under either of the standards asserted by the Second Circuit in Weddle. What the proof does show, on the other hand, is that the loans were made as an investment or to protect an investment, and only indirectly to saving Mr. Kelly's job through saving his investment. This type situation falls under the investor doctrine of Whipple. Cf. Byck, supra.

The foregoing reasoning is actually quite close to Judge Lumbard's views; the majority in Weddle might well reject it as another way of formulating a primary motivation test in terms of direct and indirect purposes.

Thereafter, in Lundgren, this Court held that the taxpayer's advances to RushMore were proximately related to his separate trade

or business of rendering services to the corporation as well as to his separate business of selling timber. That ruling was supported by two considerations. First, as noted above, stipulated facts and undisputed testimony required the conclusion that the taxpayer did not organize RushMore with the intent of receiving dividends or selling stock at a profit, but for the purpose of realizing gain from the sale of timber to the corporation and the receipt of a salary for his services to it. Second, the record showed that the necessary financing of RushMore was provided by the SBA on the express condition that the taxpayer make the personal advances involved. On this record, the court held that taxpayer made the advances to protect his employment and contemplated salary as well as to further his separate business of selling timber.

In the instant case, unlike Lundgren and Trent, taxpayer's advances to Union Finance and its customers were wholly voluntary -- not a condition of his employment. Nor is there any evidence here that, as in Lundgren, the taxpayer made his advances to protect his employment. Moreover, it is not simply a matter here -- as in Weddle and Kelly -- of a failure on the taxpayer's part to prove that his losses were incurred in a separate business; the record affirmatively shows, as demonstrated above, that taxpayer made his advances to aid the business of Union Finance and protect his investment. If confirmation of this be needed, consider the following testimony of the taxpayer (II-R. 93):

Q. Now, these advances, the money that you and your wife advanced to Union Finance Company, is it my understanding that they gave it a broader working capital base?

A. We advanced money for two reasons. For the interest we received, No. 1; and No. 2, by having the money we were able to borrow additional funds for the benefit of the finance company.

Q. This did broaden the base of your ability to get money from the bank, is that it?

A. Yes, there were two purposes. One was investment.

In short, the taxpayer had no thought of protecting his employment. And as for "the interest we received," it has already been noted above that, with negligible exceptions, only the advances to the corporation itself were interest-bearing; and that such interest as the taxpayers received was in relatively small amounts, far exceeded by the bad debt deductions claimed.

In Whipple v. Commissioner, 373 U.S. 193, the Supreme Court said that it was unwilling to disturb the Tax Court's determinations that the taxpayer was not engaged in the business of money-lending, or of financing corporations, since (373 U.S., p. 204) "we cannot say they are clearly erroneous. See Commissioner v. Duberstein, 363 U.S. 278, 289-291." This Court, as it stated in Hirsch v. Commissioner, 315 F. 2d 731, has repeatedly declared its adherence to this standard of review. In the instant case the Tax Court's findings are not only free of clear error but are amply supported by the record, and the Tax Court has applied the proper criteria to the facts as found.

For the reasons stated above, the decision of the Tax Court is correct and, accordingly, should be affirmed.

Respectfully submitted,

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February, 1968.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this _____ day of _____, 1968, in an envelope, with postage prepaid, properly addressed to him as follows:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGEL,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

DEC 18 1967

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGEL,

Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant sought a writ of habeas corpus in the District Court. Authority to grant the remedy sought is specifically conferred upon the District Court by the provisions of 28 U. S. C. §2241, which reads as follows:

"(a) Writs of habeas corpus may be granted
by the Supreme Court, any justice thereof, the district
courts and any circuit judge within their respective
jurisdictions. The order of a circuit judge shall be
entered in the records of the district court of the
district wherein the restraint complained of is had.

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. " (emphasis added)

Appellant, at all times 1/ since February 23, 1966, has been on active duty with the United States Navy (Tr. I, p. 68 2/). As such he is "in custody" within the requirements of the said statute. Orloff v. Willoughby, 343 U.S. 83, 76 S. Ct. 534, 97 L.ed. 842 (1952).

The custody is alleged to be in violation of the laws and Constitution of the United States in that the Navy, in processing appellant's request for discharge, dated January 24, 1967, did not follow certain of the procedures set forth in its own regulations (Tr. I, p. 4, Petition p. 3).

1/ During the course of this appeal, it is anticipated that appellant may be released from active duty and permitted to continue his schooling. However, he remains a member of the Naval Reserve, and the issues raised herein do not thereby become moot. The resolution of the issues herein is not affected by the fact that, pursuant to regulations, appellant may be under a different commanding officer now than at the time of filing his petition. Bishop v. The Medical Superintendent of the Iona State Hospital, etc., 377 F.2d 467 at 468 (headnote 1) (6th Cir. 1967).

2/ Citations to the record will be made as follows:

To matter in Volume I of the Transcript of Record: Tr. I, p. _
To matter in the Reporter's Transcript: Tr. II, p. _
To matter found in Exhibits admitted into evidence,
as Petitioner's Exhibit I (Department of Defense Directive 1300.6): Pet. I, p. _
as Petitioner's Exhibit II (Bureau of Personnel Manual Article C-5210): Pet. II, p. _
as Petitioner's Exhibit III (letter from Chief of Naval Personnel to appellant's counsel dated March 23, 1967): Pet. III, p. _
as Respondent's Exhibit A: Resp. A, p. _

The custody is alleged to be in further violation of the laws and Constitution of the United States in that there is no basis in fact for the denial of the said request for discharge (Tr. I, p. 5).

This Honorable Court has jurisdiction to review on appeal the Order Denying Petition for Writ of Habeas Corpus pursuant to the terms of 28 U. S. C. §2253, the pertinent provisions of which read as follows:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

(emphasis added)

STATEMENT OF THE CASE

The Order Denying Petition for Writ sets out succinctly the essence of the case:

"The record shows that on February 23, 1966, petitioner reported for active duty, pursuant to order of the Navy Department dated January 7, 1966, and was assigned the duties of a Hospital Corpsman (L-8), non-combatant duty, by reason of his having been determined to be a conscientious objector (I-A-O). He has, since that date, been on active duty with the United States Navy.

"Petitioner, by voluntary enlistment, has been a member of the Naval Reserve since June 7, 1961. Prior to reporting for active duty on February 23, 1966, and on September 18, 1965, petitioner submitted a request for discharge (Resp. A, pp. 21-32) pursuant to the provisions of Department of Defense Directive (DOD) 1300.6 and Bureau of Naval Personnel Manual, Article C-5210. He stated in his request for discharge that it was 'not until the present time' that he knew his conscience would not permit him to serve in 'the context of the Armed Forces'.

"On January 7, 1966, the Chief of Naval Personnel notified petitioner's Commanding Officer that although petitioner's request for discharge had been denied, petitioner would be designated a conscientious objector and assigned Limited Duty Designator (L-8).

"Petitioner, on February 2, 1966, mailed to the Chief of Naval Personnel a letter (Resp. A, pp. 7-11) whereby he sought reconsideration of his request of September 18, 1965, and again urged that he be discharged from the Service. With the February 2nd letter, he submitted four letters of third parties in support of his position. In his February 2nd letter, petitioner acknowledged notice of disapproval of his September 18, 1965, request for discharge and expressed his inability ' * * * to accept your decision * * *'. He said he sent the first letter through administrative channels but was now ' * * * writing you direct to request a discharge on grounds of conscientious objection * * *'. In the next to the last paragraph on the first page of the February 2nd letter, petitioner states: 'I hope this additional material will be sufficient to warrant your careful reconsideration and subsequent reversal of said orders' (emphasis added). In the second paragraph of the portion of the letter numbered 7, page 5, petitioner states: 'I implore you to reconsider my case and grant me a discharge * * *.'

"By letter dated January 24, 1967 (Resp. A, p. 47) petitioner sent another request to the Chief of Naval Personnel, through his Commanding Officer, saying he had stated ' * * * the basis and evolution of my beliefs in great detail in my previous requests referenced in this letter * * * on file in your office'. With the January 24th letter, he

enclosed two letters from Navy Chaplains.

"The request for discharge, dated September 18, 1965, was in the form, and contained all of the detailed information, as required by the regulations referred to above, Article C-5210(2). The letters of February 2, 1966, and January 24, 1967, did not contain this detailed information but referred to the first letter.

"In accordance with the provisions of Article C-5210(2)(d), the Chief of Naval Personnel, on receipt of the September 18, 1965 request, referred the case to the Selective Service for advisory opinion. The Selective Service reported that on the basis of the information submitted by petitioner that if he were being considered for induction he would be classified I-A-O. The assignment of petitioner as Hospital Corpsman (noncombatant duty) as a conscientious objector followed the opinion of Navy Chaplain Ostrander with respect to how petitioner should be classified (Resp. A, p. 34)." (Tr. I, pp. 68-70).

The court below in effect concluded that the appellant's letter of January 24, 1967, did not constitute a new request for discharge because it did not re-state all of the matters set forth in the regulations dealing with requests for discharge.

It is conceded that the letter dated January 24, 1967, was not handled in accordance with regulations applicable to a request for discharge in that:

1. Appellant's commanding officer did not interview appellant. Bureau of Personnel Manual (hereinafter BuPers Man) C-5210(2)(b) (Pet. II, p. 3).
2. The commanding officer's endorsement did not express his opinion as to the sincerity of appellant. BuPers Man C-5210(2)(b) (Pet. II, p. 3; Resp. A, p. 41).
3. The Chief of Naval Personnel did not refer that request to the Selective Service. BuPers Man C-5210(2)(d) (Pet. II, p. 3; Pet. III, p. 1).

The facts here presented give rise to the following questions:

1. Did appellant's letter of January 24, 1967, with enclosures, constitute a "request for discharge"?
2. Was the Navy required to proceed in accordance with its own regulations in dealing with appellant's letter of January 24, 1967?
3. As of January 24, 1967, was there any evidence to support the conclusion that appellant was conscientiously opposed to participation in combatant military service but not conscientiously opposed to participation in non-combatant military service?

SPECIFICATION OF ERRORS

The court erred in the following particulars:

1. The court failed to find that the letter of January 24, 1967, taken together with the matters incorporated therein by reference, and the enclosures, constituted a "request for discharge".
2. The court failed to find that the Navy had violated its own regulations in dealing with the letter of January 24, 1967.
3. The court erred in finding that there was no change in appellant's beliefs after September 18, 1965 (Tr. I, p. 77).
4. The court erred in finding that there was a basis in fact for the classification given appellant after the processing of his letter of January 24, 1967 (Tr. I, p. 76).

ARGUMENT

I

APPELLANT'S LETTER OF JANUARY 24, 1967
WITH THE ITEMS ATTACHED THERETO AND
THE MATERIAL INCORPORATED THEREIN BY
REFERENCE CONSTITUTED A NEW REQUEST
FOR DISCHARGE.

The effect of appellant's letter of January 24, 1967, is critical in the determination of the issues here presented. If that letter constitutes a "request for discharge" then certain consequences reasonably follow. Because of its crucial importance that letter is set forth here in full as follows:

"24 January 1967

"From: MINASIAN, Lawrence J., 546 43 43, HN, USNR

"To : Chief of Naval Personnel

"Via : Commanding Officer of US Naval Hospital in the
USS HAVEN (AH-12)

"Ref : (1) BuPers spdltr Pers B2221/mbb of 7 January
1966 (NOTAL)
(2) Pers B2221/irn

"Subj : Request for discharge for reason of conscientious
objection

"Enc : (1) LCDR Robert L. Bigler, CHC, USN, letter of
20 January 1967
(2) LCDR Jack E. Six, CHC, USN, Memorandum of
17 January 1967
(3) Eugene Carson Blake, Stated Clerk of the United
Presbyterian Church, letter of 14 September 1965
(4) Howard C. Maxwell, Office of Church and Society
of the United Presbyterian Church, letter of 15
September 1965

"1. I request to be discharged from the United States
Naval Reserve by reason of conscientious objection to
military service. During the last year I have performed

my duties to the best of my ability and have cooperated in every way with the Navy. I now find that a conscience is not easily laid to rest and that I must again pursue this matter with my whole being regardless of consequence. My hope is that, given a country such as ours founded on the principle of religious freedom there is room for men of minority view point to dissent. Therefore, I am making this third appeal for discharge.

"2. I have stated the basis and evolution of my beliefs in great detail in my previous requests referenced in this letter and on file in your office. I stated them there as clearly as I am able. It is folly for me to attempt to prove to you that my objection to military service is my response to God's Love. Such a thing cannot be proven. Indeed, it is just as impossible to prove God's existence, or that I love my wife, or that I have faith, as it is to prove that my objection is bonafide.

"3. With this request I have included statements from two Presbyterian Navy Chaplains concerning my request. Also included with this request are letters from the then Stated Clerk of the United Presbyterian Church and the Office of Church and Society of same stating that I have the support of my Church in taking this stand. I hope that the enclosed statements along with the information included in my previous statements will be an aid to you in considering my case.

"4. I again reaffirm my willingness to complete my obligation through civilian alternate service. Please review my previous requests. What is written therein is just as true today as when I wrote it.

Respectfully yours,

Lawrence John Minasian

Lawrence John Minasian"

On its face the letter of January 24, 1967, states "I am making this third appeal for discharge", and "I have stated the basis and evolution of my beliefs in great detail in my previous requests referenced in this letter and on file in your office". The intent to incorporate by reference material previously submitted is clear.

The material to be incorporated is identified with certainty.

The contents of a request for discharge under these circumstances are specified in BuPers Manual C-5210(2)(a) (Pet. II, p. 2) which states that "Each request for discharge will be accompanied by a statement from the member containing the following information":

"1. General Information:

"a. Full Name

"b. Service Number

"c. Selective Service Number

"d. Duty Station

"e. Permanent Home Address

"f. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

"g. Give a chronological list of all occupations, positions, jobs, or type of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer, and the from/to date for each position or job held.

"h. Give all addresses and dates of residence where you have formerly lived.

"i. Give the name and address of your parents and indicate whether they are living or deceased.

"j. State the religious denomination or sect of your father and mother.

"k. Did you apply to the Selective Service System (local board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the board, if known?

"l. If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes __ No __.

"Will you consent to the issuance of an order for such work by your local Selective Service Board? Yes ____ No ____.

"2. Religious Training and Belief:

"a. Do you believe in a Supreme Being?

"b. Describe the nature of your belief which is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

"c. Explain how, when, and from whom or from what source you received the

training and acquired the belief which is the basis of your claim.

"d. Give the name and present address of the individual upon whom you rely most for religious guidance.

"e. Under what circumstances, if any, do you believe in the use of force?

"f. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

"g. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

"3. Participation in Organizations:

"a. Have you ever been a member of any military organization or establishment before entering the naval service for this tour? If so, state the name and address of same and give reasons why you became a member.

"b. Are you a member of a religious sect or organization? If your reply is 'yes' -

"1. State the name of the sect, and the name and location of its governing body or head, if known to you.

"2. When, where, and how did you become

a member of said sect or organization?

"3. State the name and location of the church, congregation, or meeting where you customarily attend.

"4. Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

"5. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

"(c) Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

"4. References: Give the name, full address, occupation or position, and relationship to you, of persons who could supply information as to the sincerity of your professed convictions against participation in war."

The letter from appellant dated September 18, 1965, which the appellant and all parties hereto considered to be a complete request for discharge, answers each item in full. That letter was written and sent through channels, with attachments, while appellant was still on inactive status, prior to his being activated (Resp. A, pp. 21-37).

The letter from appellant dated February 2, 1966, still prior

to his activation, referred on its face to the previous request for discharge, included additional statements by the appellant concerning his religious views, and submitted several letters in support of the reviewed request for discharge (Resp. A, pp. 7-14).

The statement of intention, in the letter of January 24, 1967, to incorporate therein specifically identified material which had previously been submitted to the same authority (Chief of Naval Personnel), is unequivocal. Does such a clearly stated intention suffice to incorporate the previously submitted material?

An analogous situation is presented by amended pleadings which incorporate therein by reference matter set out in earlier pleadings. In this regard Rule 10(c) of the Rules of Civil Procedure provides:

"(c) ADOPTION BY REFERENCE; EXHIBITS.

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. "

In its commentary on the rule, Moore's Federal Practice Second Edition, 1967, makes the following observation in volume 2A at page 2013:

"Par. 10.05. Adoption by Reference.

"Although the practice of referring to statements in a pleading by the designation of the paragraph

in which such statements are to be found is an obvious convenience to a pleader and eliminates repetition, the older point of view reflected the common-law notion that such reference was not effective [citations]. The modern view is that stated in the first sentence of Rule 10(c) - that 'Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion' [citations]. Such a mode of pleading should be encouraged, since it avoids the repetition and redundancy that otherwise exists.

"Courts have generally held that the reference must be clear and explicit before incorporation by reference is effective [citations]. For example, incorporation in a counterclaim of 'all of the allegations contained in this amended answer' has been held improper where the allegations thus incorporated were 'scattered through paragraphs which in part deny allegations of the Complaint' and where, in addition, some of the incorporated paragraphs themselves contained incorporations of previous paragraphs [citations]. It has also been held that it is not permissible to incorporate by reference in an amended pleading, exhibits attached to the original pleading [citations], although this seems questionable. An arbitrary standard, however, should not be insisted

on. The proper test should be one of certainty: is it clear what statements are meant to be adopted? Any designation which accomplishes this should be satisfactory under the standard of liberal construction laid down in Rule 8(f). "

The appellant should not be held to a stricter technical procedure in submitting his request for discharge than is an attorney in the preparation of pleadings under the Federal Rules.

The letter of January 24, 1967, is clear and explicit as to the matters incorporated therein by reference. Taken together with its contents and enclosures it fulfills all the requirements of the applicable regulations as a new and complete request for discharge.

II

THE LETTER OF JANUARY 24, 1967, DEMONSTRATED A SUBSTANTIAL CHANGE IN APPELLANT'S VIEWS AS COMPARED WITH THOSE SET FORTH IN HIS PREVIOUS REQUEST FOR DISCHARGE.

The letter of January 24, 1967, which is set out in full above, on its face asserts:

"During the last year I have performed my duties to the best of my ability and have cooperated in every way with the Navy. I now find that a conscience is not easily laid to rest and that I must again pursue this matter with my whole being regardless of consequence. "

Letters from two Chaplains were submitted with the appellant's letter of January 24, 1967. The letter from Jack E. Six, LCDR, CHC, USN, dated January 17, 1967, makes the following material assertions (Resp. A, p. 44):

1. Appellant had "over the past year sought the counsel and guidance of the Naval Station Chaplain's Office in his desire to be classified as a conscientious objector".
2. Appellant on January 24, 1967, had been referred to Chaplain Six for "assistance in making another request for classification".
3. In the opinion of Chaplain Six as of January 17, 1967, appellant "is sincere and devoted to his personal convictions concerning military service. His position is now marked by an unwillingness to serve even as a non-combatant." (emphasis added)

The letter from Robert L. Bigler, Hospital Chaplain dated January 20, 1967 (Resp. A, p. 43) reads as follows:

"20 January 1967

"From: LCDR Robert L. BIGLER, CHC, USN, 571073/460

"To : Whom It May Concern

"Subj : MINASIAN, Lawrence J., 546 43 43 HN, USNR:
Request for classification as a Conscientious Objector

"1. I have on many interviews with MINASIAN come to the conclusion that he is a devout, sincere follower of Jesus Christ within the framework of the United Presbyterian Church. He has come to me with a request for assistance in obtaining a discharge from the United States Navy because of his conscientious belief that he should not even

wear the same uniform as those who are in a combatant status in the Armed Forces and that to do so violates the religious teaching of the Church and his Lord. I am convinced of his sincerity and have reviewed the logical process with him which requires he take this stand.

"2. As a United Presbyterian minister serving on active duty as a chaplain, as is Chaplain Six (who has seen this man for a longer period), I must state that our Church does make a provision for those who take such a stand and that MINASIAN has registered his belief in the conscientious objector position he has taken with the Stated Clerk of the General Assembly of our Church in Philadelphia, in September of 1965. The intense religious turmoil in still remaining in the Naval Service is a great burden on this man. He has suffered much mental anguish in taking his stand.

"3. I strongly recommend that MINASIAN'S request for discharge as a conscientious objector be granted for the good of the man and the Naval Service.

Robert L. Bigler

ROBERT L. BIGLER
HOSPITAL CHAPLAIN"

The regulations relating to request for discharge on their face do not apply to persons whose conscientious objections existed before enlistment. The regulations obviously contemplate the possibility of changes in the views of members of the armed services, after enlistment or activation, on the subject of conscientious objection.

We have no choice but to assume that the chaplain (Resp. A, p. 34) and the commanding officer (Resp. A, p. 33) who interviewed appellant concerning his first request for discharge dated September 18, 1965, properly concluded that he was then conscientiously opposed to combatant duty. Their recommendations were forwarded

to the Chief of Naval Personnel (Resp. A, p. 38), then to Selective Service (Resp. A, p. 18). "Based on the information in this file", Lewis B. Hershey, as Director of Selective Service, concluded that appellant "would be properly classified in Class 1-A-O, as a conscientious objector, if he were being considered for induction at this time" (Resp. A, p. 17).

Appellant's letter of January 24, 1967 and the enclosed letters from the Chaplains clearly demonstrate that appellant had moved from his earlier position to a position which was, according to Chaplain Jack E. Six, "now marked by an unwillingness to serve even as a non-combatant" (emphasis added; Resp. A, p. 44). The difference is one of intensity of belief and a changed conviction as to where he must draw the line.

A comparison of the statement of LCDR Donald H. Ostrander (Resp. A, p. 34), which was forwarded with appellant's first request for discharge, with the letters of Chaplains Bigler and Six (Resp. A, pp. 43 and 44), which were submitted with appellant's letter of January 24, 1967, shows a marked change in point of view.

Appellant in the hearing in the District Court was permitted to testify concerning the change in his position which occurred in January 1967, just prior to filing his letter of January 24, 1967. This testimony was admitted only after respondent had conceded that appellant's commanding officer did not interview him following the submission of that letter; and it was admitted to permit the court to hear from appellant what the Commanding Officer could have heard had he interviewed appellant.

In Webster's New World Dictionary of the American Language,
College Edition (1964), p. 312, "conscience" is defined as follows:

"A knowledge or feeling of right and wrong, with a
compulsion to do right; moral judgment that prohibits
or opposes the violation of a previously recognized
ethical principle."

Most people recognize the validity of the ethical principle:

"Thou shalt not kill!"; some have conscientious convictions which
prohibit participation in combatant military service; others have
conscientious convictions which prohibit participation in any capacity
in any branch of the military service. This variation in the level of
conscientious objection to participation in war is recognized by the
Selective Service and Training Act (Title 50, U.S.C. App. §456(j))
and by the regulations cited above.

The conclusion of the court below that "There is no indication
of change" in appellant's beliefs since September 18, 1965, is
unfounded and is unsupported by the evidence. The event of January
8, 1967, involving "the determination on the part of the petitioner to
implement his beliefs by action, to wit, refusal to continue on non-
combatant service status" (Tr. I, p. 63) represents the very change
in position which was recognized by the creation of classifications
1-O and 1-A-O in the Selective Service system.

With or without the testimony of appellant in the hearing in
the District Court, the record clearly establishes that significant
changes had occurred in appellant's position subsequent to his

activation and just prior to his submission of his letter of January 24, 1967.

III

IN THE PROCESSING OF APPELLANT'S LETTER OF JANUARY 24, 1967, THE PER- TINENT NAVY REGULATIONS WERE VIOLATED.

As has been set forth above, following the submission of his letter of January 24, 1967, with enclosures, the appellant was not interviewed by his commanding officer, the endorsement of the commanding officer did not state an opinion as to the sincerity of appellant, and appellant's said request was not submitted to Selective Service for its review and recommendation.

Assuming that the letter of January 24, 1967, constituted a request for discharge, these omissions were in direct violation of the required procedures as set forth in BuPers Man C-5210 (Pet. II, Article C-5210(2)(b) and (d)).

The Chief of Naval Personnel did not forward the request of January 24, 1967 to Selective Service. In a letter to appellant's counsel, an officer acting at the direction of the Chief of Naval Personnel justified this failure to follow regulations in the following manner (Pet. III, p. 1):

"After a careful review of the circumstances of his requests, it has been determined that no additional substantive information has been submitted which would warrant a reversal of the previous decision

rendered in his case. His request was not forwarded to the Director, Selective Service because there was no new evidence which warranted such referral. " (emphasis added)

Appellant's letter of January 24, 1967, was not referred to Selective Service, not because it was not a suitable request for discharge, but because it contained "no new evidence which warranted such referral".

In view of the preceding discussion, it is clear that the letter of January 24, 1967, with enclosures, did indeed present new evidence which, if accepted by Selective Service in the same manner in which Selective Service accepted the first request for discharge, would have led to a recommendation by Selective Service that appellant should be discharged.

The office of the Chief of Naval Personnel either did not read the letters from the two chaplains or did not comprehend the significance of the opinions expressed therein. In either event the fact that appellant's file containing his letter of January 24, 1967, was not forwarded to Selective Service, is undenied.

A. This Violation of Regulations Denies
Appellant Due Process of Law and
Equal Protection of Law.

Appellant concedes that no legislation confers upon him or on anyone else a right to be discharged from military service by reason of conscientious objection. However, the Navy has, pursuant to the direction of the Department of Defense, adopted Article C-5210. The declared purpose of DOD Directive 1300.6 is to establish

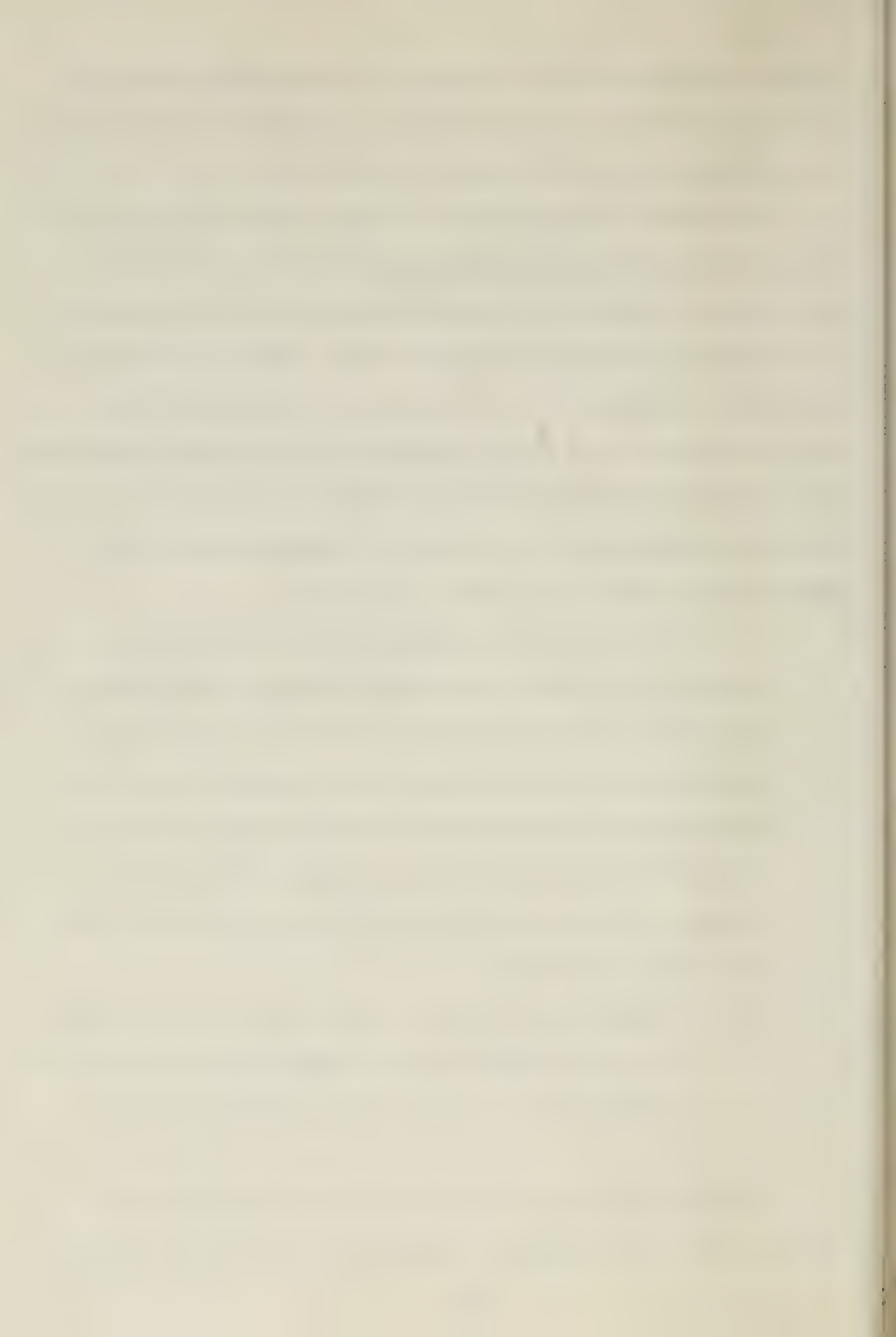
"uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection" (Pet. I, p. 1).

The Order Denying Petition for Writ of Habeas Corpus cites the recent case of Brown v. McNamara, 263 F. Supp. 686 (D. C. N. J. 1967), as authority for the proposition that the Court has no jurisdiction to review the ruling of the Chief of Naval Personnel in this matter. However, a careful reading of the Brown decision discloses that the court there concluded that the pertinent regulations had been followed in the disposition of Brown's request for discharge. That decision specifically supports the propositions upon which appellant here relies (263 F. Supp. at p. 691):

"However, even though the Constitution does not require a procedure whereby post-induction conscientious objectors can have their claims passed upon, once such a procedure is established and put into operation it must be administered in a manner which provides equal protection of laws ¹ to all those to whom it is open. Cf. Griffin v. People of State of Illinois, 351 U. S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956).

"1. See Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954) which appears to incorporate the equal protection clause into the fifth amendment. "

Having concluded that the appropriate regulations were followed, the court in Brown refused to review the factual basis for



the determination. To be consistent with the Brown decision here would require the granting of appellant's petition.

The failure to follow regulations constitutes a denial of due process of law and of equal protection of the law to appellant.

IV

AS OF JANUARY 24, 1967, THERE WAS NO
SUBSTANTIAL EVIDENCE TO SUPPORT
APPELLANT'S CLASSIFICATION AS AN OB-
JECTOR ONLY TO COMBATANT MILITARY
SERVICE.

When the appellant's letter of January 24, 1967, was forwarded to the Chief of Naval Personnel, it incorporated by reference his previous statements as to his religious beliefs, supplemented by a statement by the appellant as to his religious development during his period of active duty, and two letters from chaplains confirming their belief in his sincerity and recommending his discharge.

Had the regulations been followed, and had the Commanding Officer interviewed appellant, he may have concluded that appellant was not sincere. In that event the Commanding Officer presumably would have expressed that adverse opinion in forwarding the matter to the Chief of Naval Personnel; such adverse opinion would have provided a basis in fact for a denial of appellant's request for discharge. But that is pure speculation. The record discloses no facts whatsoever upon which to base the conclusion that appellant as of January 24, 1967, was conscientiously opposed to participation in non-combatant military service, but was not conscientiously opposed



to participation in all forms of military service.

V

APPELLANT IS ILLEGALLY HELD IN CUSTODY.

Arbitrary and capricious actions on the part of military authorities in dealing with members of our citizen armed forces are no less tolerable than arbitrary and capricious actions by Selective Service Boards, prior to induction. Decisions of the Chief of Naval Personnel, made in violation of regulations and without a basis in fact are not final where, as in Estep v. United States, 327 U.S. 144 (1945), at page 122, " . . . we are dealing . . . with a question of personal liberty".

In Estep the Court concluded that the defendant's conviction must be set aside because the defendant had been denied the opportunity to establish that the order for induction, which he had violated, was void because the Selective Service Board had exceeded its jurisdiction in issuing the order. The Board acted in excess of its jurisdiction because there was "no basis in fact for the classification which it gave the registrant" (327 U.S. at p. 122). The Court assumed that Estep could obtain release by habeas corpus after induction, and held that he should be entitled to the defense of lack of jurisdiction to avert a situation "that requires the court to march up the hill when it is apparent from the beginning that they will have to march down again" (p. 125).

Habeas corpus is the appropriate remedy to obtain release



from military service after induction pursuant to a Selective Service Board order made in excess of the Board's jurisdiction. Habeas corpus is likewise the appropriate remedy where the denial of a request for discharge is made pursuant to procedures which deny equal protection of the law and in a setting where there is no basis in fact for the classification which results.

CONCLUSION

The denial of appellant's request for discharge was reached in violation of applicable regulations and without a basis in fact for the denial. Appellant is presently in custody in violation of the Constitution of the United States, and should be discharged forthwith from service in the United States Navy or the Naval Reserve in any capacity.

Respectfully submitted,

RICHARD W. PETHERBRIDGE

Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Richard W. Petherbridge
RICHARD W. PETHERBRIDGE

N O. 2 2 0 2 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGLE,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

FEB 19 1968

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FEB 23 1968

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APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the Central District of California, denying appellant's Petition for Writ of Habeas Corpus. The District Court entertained the Petition under 28 U.S.C. §2241 (1964). This Court has jurisdiction pursuant to 28 U.S.C. §2253 (1964).

Appellant filed a Petition for Writ of Habeas Corpus on April 4, 1967 (Tr. I, pp. 2-7). ^{1/} Appellant made no jurisdictional

^{1/} For convenience, appellee hereby adopts the same system of parenthetical references as were utilized in Appellant's Opening Brief, to wit:
(Continued)

allegation in said Petition.

The District Court on April 4, 1967, issued an Order To Show Cause directing appellee to show cause why a writ of habeas corpus should not issue (not included in Transcript of Record).

On April 20, 1967, appellee filed an Answer to the aforementioned Order To Show Cause; Return to the Petition for Writ of Habeas Corpus (Tr. I, pp. 14-19). No Traverse was filed by appellant.

Among other affirmative defenses, appellee alleged that appellant failed to state a claim upon which relief can be granted; and the court lacked jurisdiction of the subject matter of this suit (Tr. I, p. 17).

Appellee's argument concerning jurisdiction and other affirmative defenses raised herein, follows in Point I of Argument.

1/ Continued:

Matter in the Transcript of Record: Tr. I, p. ____;

Matter in the Reporter's Transcript: Tr. II, p. ____;

Matter found in exhibits admitted into evidence as:

Petitioner's Exhibit I (Department of Defense Directive 1300.6(1962): Pet. I, p. ____;

Petitioner's Exhibit II (Part C-5210, Bureau of Naval Personnel Manual): Pet. II, p. ____;

Petitioner's Exhibit III (letter from Chief of Naval Personnel to appellant's counsel, dated March 23, 1967):

Pet. III, p. ____;

Respondent's Exhibit A (Certified Military Record relative to appellant's request for discharge): Resp. A, p. ____; and,

Parenthetical references to Appellant's Opening Brief: Brief, p. ____.

STATEMENT OF THE CASE ^{2/}

Appellant was born July 24, 1942, is a male citizen of the United States of America (Resp. A, p. 3).

On June 7, 1961, appellant voluntarily enlisted in the Naval Reserve (Resp. A, pp. 1, 3). On January 8, 1964, appellant agreed to extend his enlistment for four years, in consideration of being deferred from active duty for three years, subject to certain conditions (Resp. A, p. 2).

From appellant's enlistment on June 7, 1961, through January 1966, he participated in Naval Reserve activities.

Appellant's Service Record reflects that he acknowledged on June 2, 1965, that he would be ordered to active duty on or about September 1965.

In July 1965, appellant applied for admission to Officers' Candidate School, which application was denied by Naval authorities (Resp. A, pp. 33-34).

Appellant submitted his request for discharge by reason of his contended conscientious objection, on or about September 18, 1965 (Resp. A, pp. 21-37).

Appellant's request for discharge was submitted pursuant

^{2/} Appellant's Statement of the Case erroneously asserts appellee conceded that the letter dated January 24, 1967, was not handled in accordance with regulations applicable to a request for discharge, and omits pertinent portions of the Memorandum Opinion of the District Court (Brief, pp. 5-8). In accordance with Rule 18, subdivision 3 of the Rules of this Court, appellee presents his Statement to controvert that of appellant.

to Department of Defense Directive 1300.6 (1962), (Pet. I), and Part C-5210, Bureau of Naval Personnel Manual (Pet. II), which provide for uniform procedures for the utilization of conscientious objectors in the armed forces, consideration of requests for discharge on the grounds of conscientious objection, and for discharge in appropriate cases "by reason of convenience of the government" (Pet. II, pp. 227-228).

Appellant's request for discharge dated September 18, 1965, was forwarded through channels with appropriate counseling, endorsements and recommendations by intermediate officers, and was referred to the Director, Selective Service, for advisory opinion (Resp. A, pp. 18-20). The Director, Selective Service, found that appellant would be properly classified I-A-O, if he were being considered under Selective Service Regulations (Resp. A, p. 17). Appellant's commander was advised, that based upon the information obtained from the Director, Selective Service, " * * * and all the facts and circumstances in his case, * * *" appellant's request for discharge was not approved, and he was assigned a Limited Duty Designator (L-8) as a non-combatant (Resp. A, p. 16).

By correspondence dated February 2, 1966, addressed to Chief of Naval Personnel, appellant requested reconsideration of his request for discharge (Resp. A, pp. 7-15). Appellant's request for reconsideration and attached correspondence was reviewed and denial of appellant's request for discharge was affirmed on February 11, 1966 (Resp. A, p. 4).

By letter of January 24, 1967, a "third appeal for discharge"

was made by appellant (Resp. A, pp. 42-46), wherein he refers to "previous requests" and requests review of previous requests (Resp. A, p. 42). By correspondence dated February 14, 1967, appellant was advised that after review of his final request for reconsideration of his request for discharge as a conscientious objector, the previous decision was affirmed (Resp. A, p. 39).

ISSUES RAISED ON APPEAL

Appellant, at page 8a of his Opening Brief, specifies that the District Court erred in the following particulars:

- "1. The court failed to find that the letter of January 24, 1967, taken together with the matters incorporated therein by reference, and the enclosures, constituted a request for discharge.
- "2. The court failed to find that the Navy had violated its own regulations in dealing with the letter of January 24, 1967.
- "3. The court erred in finding that there was no change in appellant's beliefs after September 18, 1965 (Tr. I, p. 77).
- "4. The court erred in finding that there was a basis in fact for the classification given appellant after the processing of his letter of January 24, 1967 (Tr. I, p. 76)."

REGULATIONS INVOLVED

Appellant sought to be released from the Naval Reserve pursuant to Department of Defense Directive 1300.6 (1962) (Pet. I), as implemented by the U. S. Navy in Part C-5210, Bureau of Naval Personnel Manual (Pet. II).

DOD 1300.6 (Pet. I) provides in pertinent part:

"SUBJECT: Utilization of Conscientious Objectors
and Procedures for Processing Requests
for Discharge Based on Conscientious
Objection

* * *

"I. PURPOSE

"This Directive establishes uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection.

* * *

"III. POLICY

"A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the

completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.

* * *

"D. It is the policy of the Department of Defense that requests for discharge from the military service on the grounds of conscientious objection will be handled on an individual basis, with final determination made at the departmental headquarters of the individual's service in accordance with the facts and circumstances in the particular case and the criteria of this Directive. * * *

* * *

"F. The standards used by the Selective Service System in determining 1-O [sic] or 1-A-O [sic] classification of draft registrants prior to induction are considered appropriate for application to cases of servicemen who claim conscientious objection after entering military service. * * *

"G. In order to insure the maximum practicable uniformity among the services and between

members of the same service, advisory opinion by the Selective Service that a classification of 1-O [sic] is appropriate will normally be a requisite for discharge or release of members with less than two years active service based on conscientious objection." (Pet. I, pp. 1-3)

Part C-5210, Bureau of Naval Personnel Manual (Pet. II), contains provisions equivalent to, and implementing DOD 1300.6 (1962).

The current criteria utilized by Selective Service for classification of registrants prior to induction, as adopted by DOD 1300.6 (1962), to be applied to in-service claims of conscientious objection are found in 32 C.F.R. §1622.11 (1967) for Class I-A-O and 32 C.F.R. §1622.14 (1967) for Class I-O. (Review of 32 C.F.R. §§ 1622.11, 1622.14, reveals that there have been no changes in said sections at any time relevant to this case.)

"§ 1622.11 Class I-A-O: Conscientious objector available for noncombatant military service only.

"(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

"(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

"§ 1622.14 Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.

"(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

"(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended,

provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. "

SUMMARY OF ARGUMENT

Appellant, as an enlisted member of the armed forces, is subject to no restraint other than that ordinarily incident to military service, is not "in custody" so as to invoke jurisdiction pursuant to 28 U. S. C. §2241 (1964). If appellant seeks judicial review of the Navy's denial of his request for discharge on any other basis, he has failed to join an indispensable party.

In processing appellant's request for discharge by reason of conscientious objection, Naval authorities have substantially complied with required procedural steps and there is basis in fact contained in the certified record (Resp. A) for denial of his request.

POINT I

APPELLANT, A VOLUNTARY ENLISTEE, ON ACTIVE DUTY IN THE UNITED STATES NAVY, IS NOT "IN CUSTODY", EITHER UNDER COLOR OF AUTHORITY OF THE UNITED STATES OR IN VIOLATION OF ITS LAWS. 28 U.S.C. §2241(c)(1)(3) (1964).

Appellant cites Orloff v. Willoughby, 345 U.S. 83 (1953),

for the proposition that by virtue of the fact that "Appellant, at all times since February 23, 1966, has been on active duty with the United States Navy * * *. As such he is 'in custody' within the requirements * * *" (Brief, p. 3) of 28 U.S.C. §2241 (1964).

Orloff was a conscript, whereas appellant was an enlistee; however, they share a common denominator: they each lawfully entered military status. In Orloff, supra, at pages 93-94, the court states:

" * * * [W]e are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner. * * *

"While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

"But the proceeding being in habeas corpus,

petitioner urges that, if we may not order him commissioned or his duties redefined, we may hold that in default of granting his requests he may be discharged from the Army. Nothing appears to convince us that he is held in the Army unlawfully, and, that being the case, we cannot go into the discriminatory character of his orders. "

From the foregoing it is apparent that Orloff v. Willoughby, supra, based upon the facts alleged in appellant's Petition for Writ of Habeas Corpus, sustains appellee's affirmative defense that the court below lacked jurisdiction of the subject matter of the case at bar.

Discharge of validly enlisted military personnel who contend they have become conscientious objectors after their current enlistment commenced, is a matter solely within the discretion of military authorities and courts lack jurisdiction of such cases. Noyd v. McNamara, 267 F. Supp. 701, 708 (D. C. Colo. 1967), affirmed 378 F.2d 538 (10th Cir. 1967), cert. denied 36 U. S. L. W. 3256 (U.S. Dec. 19, 1967); Petition of Green, 156 F. Supp. 174, 181 (S.D. Cal. 1957); But cf., Brown v. McNamara, No. 16454, United States Court of Appeals for the Third Circuit, Nov. 24, 1967. ^{3/}

It should be noted that the Honorable E. Avery Crary, in

^{3/} See Appendix "A".

the Memorandum Opinion herein states that he agrees with the holding in the case of Brown v. McNamara, 263 F. Supp. 686 (D. C. N. J., 1967), to the effect that the court has no jurisdiction to review requests for discharge such as this (Tr. I, pp. 76-77); but said Opinion further states:

"However, since the petitioner in the instant matter was a reservist at the time he applied for discharge and the application for discharge was made before he was ordered to active duty, the court, out of an abundance of precaution, has assumed jurisdiction for the limited purpose noted herein." (Tr. I, p. 77)

Evidently, the court concluded there was a parallel between an inductee and a reservist not on active duty. Appellee contends there is a distinction which is crucial, to wit, the inductee has not voluntarily submitted himself to military authority; whereas, the enlistee has, upon enlistment voluntarily submitted himself to military authority, including active duty. Noyd v. McNamara, supra, p. 708.

Appellant is subject to no greater restraints than those which normally inhere in his status as an enlistee and appellant may not predicate a habeas corpus action on such restraint. United States v. Jack, 351 F.2d 672 (2nd Cir. 1965); McCord v. Page, 124 F.2d 68 (5th Cir. 1941).

Appellant is not "in custody" either under color of the authority of the United States or in violation of its laws. See,

Marten Crijins de Rozario v. Commanding Officer, Armed Forces Examining and Induction Station, No. 21,623, United States Court of Appeals for the Ninth Circuit, Dec. 21, 1967. Therefore, the District Court did not have jurisdiction to entertain this matter pursuant to 28 U.S.C. §2241 (1964).

If appellant is attempting to obtain judicial review of the decision of the Chief of Naval Personnel, other than by habeas corpus, he has failed to join an indispensable party. Williams v. Fanning, 332 U.S. 490 (1947); see, Yates v. Manale, 341 F.2d 294 (5th Cir. 1965); Adamietz v. Smith, 273 F.2d 385 (3rd Cir. 1960), cert. denied 363 U.S. 850; Bovard v. Young, 265 F.2d 823 (D.C. Cir. 1960).

POINT II

APPELLANT'S LETTER OF JANUARY 24, 1967, WITH THE ITEMS ATTACHED THERE-TO AND THE MATERIAL INCORPORATED THEREIN BY REFERENCE DID NOT CONSTITUTE A NEW REQUEST FOR DISCHARGE SO AS TO REQUIRE PROCESSING DE NOVO.

Appellant argues that his letter of January 24, 1967, together with attachments (Resp. A, pp. 42-46), constituted a new request for discharge so as to require complete processing pursuant to Part C-5210, Bureau of Naval Personnel Manual (Pet. II).

The District Court found:

"The Commanding Officer of petitioner and other Naval personnel, in acting on the application of

petitioner for discharge and his requests for further or reconsideration thereof, were entitled to reasonable discretion in their implementation of the regulations and no abuse of discretion has been established. Surely the Navy Department should not be put to the fully detailed process, as a new request, of every letter a petitioner files urging error in the decision of the Chief of Naval Personnel, as to a prior request for discharge." (Tr. I, pp. 77-78).

Appellant contends in effect (Brief, p. 21) that the request for discharge dated January 24, 1967 (Resp. A, pp. 42-46), evidences a change in his position so as to warrant discharge (I-O classification), by virtue of the determination on the part of appellant to implement his beliefs by action, to wit, refusal to continue on noncombatant duty status. Appellant cites no authority for the foregoing conclusion. Obviously, the representations of appellant relative to what his convictions dictate are a separate consideration from whether or not appellant qualifies for I-O as opposed to I-A-O. Review of appellant's January 24, 1967, request for discharge (Resp. A, pp. 42-46) will show not a single substantive factor is added to his requests of September 18, 1965 (Resp. A, pp. 21-37) and February 2, 1966 (Resp. A, pp. 6-15). From the beginning, appellant contended he was qualified for I-O classification if he were being considered under Selective Service criteria. Appellant could not purge from the record the statement of Navy

Chaplain, Lieutenant Commander Donald H. Ostrander, who chronicles appellant's actions and concludes, "beliefs are compatible with non-combatant status" (Resp. A, p. 34).

By way of observation, Chaplain Ostrander's conclusion has been borne out, for notwithstanding appellant's representations that he would not carry out his duties as a non-combatant or combatant (Resp. A, p. 11), nor could he continue to violate what he believes to be God's will (Tr. II, pp. 9-10), he has continued to carry out his military assignments as a noncombatant.

In the sworn-to Answer and Return on file herein (Tr. I, pp. 14-19), appellee alleges that appellant's requests of February 2, 1966 (Tr. I, p. 15), and January 24, 1967 (Tr. I, p. 16), were requests for reconsideration of appellant's previous request for discharge of September 18, 1965, and by such requests for reconsideration, no new relevant matter was added to said initial request.

Appellant omitted to file a Traverse to Appellee's Answer and Return.

The District Court found:

"The Navy Department had jurisdiction to process and rule on the request for discharge of petitioner, as filed September 18, 1965, and revived for reconsideration by petitioner on February 2, 1966, and January 24, 1967." (Tr. I, p. 76).

Appellee submits that, based upon the record, the District

Court was correct in its finding that all requests after September 18, 1965, were requests for reconsideration.

Moreover, in accordance with 28 U.S.C. §2248 (1964), the allegations contained in Appellee's Answer and Return are conclusive, except to the extent that the District Court found they are not true, since appellant failed to file a Traverse. Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953).

In order for this Court to set aside the findings of fact as urged by appellant, such findings would have to be found to be "clearly erroneous" as provided in Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C. (1964). The record sustains the findings of the District Court, and with this point falls appellant's second specification of error.

POINT III

APPELLANT'S REQUEST FOR DISCHARGE
AND SUBSEQUENT REQUESTS FOR RECON-
SIDERATION HAVE BEEN PROCESSED IN
ACCORDANCE WITH REQUIRED PROCEDURE.

Part C-5210, Bureau of Naval Personnel Manual (Pet. II), provides for procedures to be followed in processing requests for discharge by reason of conscientious objection, and provides in pertinent part:

"(b) The commanding officer and a chaplain, if available, shall interview the member and review the information contained in his request. The commanding officer's endorsement shall in all cases express his opinion as to the sincerity of the man and if request or recommendation is for assignment to noncombatant duties * * *.

"(c) Immediately upon receiving a request for discharge * * * the commanding officer will advise and counsel the member concerning the provisions of Section 3103, Title 38, United States Code, * * *.

"(d) The Chief of Naval Personnel will refer the cases of all members who have completed less than 2 years of active duty to Selective Service for an advisory opinion." (Pet. II, p. 227)

Naval authorities complied with the foregoing procedures to the letter. Appellant's commander interviewed him and made appropriate entries in the record (Resp. A, pp. 33, 20). A Navy chaplain likewise interviewed appellant and made appropriate recommendations (Resp. A, p. 34). Appellant's case was forwarded to the Director, Selective Service, for advisory opinion (Resp. A, p. 18), and appellant was found to qualify as I-A-O, if he were being considered for induction (Resp. A, p. 17).

All subsequent requests by appellant are obviously requests

for reconsideration of decision by the Chief of Naval Personnel that in lieu of discharge, he would be designated a noncombatant to be assigned Limited Duty Designator (L-8) (Resp. A, p. 16), which offer no new material facts which warranted further referral to the Director, Selective Service, or other processing than accorded.

Appellant grants "that no legislation confers upon him or on anyone else a right to be discharged from military service by reason of conscientious objection." (Brief, p. 23). Department of Defense Directive 1300.6 (1962) (Pet. I) and Part C-5210, Bureau of Naval Personnel Manual (Pet. II) each provides that no vested right exists for an individual to be discharged from military service at his own request before the expiration of his term of service, and discharge prior to completion of term of service is discretionary with the service, in this case the Secretary of the Navy, based upon the facts and circumstances in the case (Paragraph III. A., DOD 1300.6 (1962) (Pet. I); and paragraph (1), Part C-5210, Bureau of Naval Personnel Manual (Pet. II).

The District Court concluded there was no denial of basic procedural fairness in processing appellant's request for discharge (Tr. I, p. 76). Even if, as appellant contends, there were a failure to follow regulations herein -- could the court order appellant released from service, based upon the facts of this case? Obviously not, perhaps the court could order reprocessing; but appellant contends that it does not follow that if a procedural omission is found to exist that ipso facto appellant is to be judicially released from service.

POINT IV

THERE IS BASIS IN FACT FOR FINDING THAT APPELLANT SHOULD BE A NONCOMBATANT.

As a preliminary matter the test to be applied, assuming, arguendo, that the court has jurisdiction, is relevant at this juncture: It is obvious from the Memorandum Opinion that the "basis in fact" test was applied by Judge Crary (Tr. I, pp. 73-76). Appellant alleged in his Petition for Writ of Habeas Corpus that "there is no substantial evidence to support his classification as an objector only to combatant military service" (Tr. I, p. 5).

Further assuming, arguendo, that the "substantial evidence" rule applies, appellee submits that the decision of the Chief of Naval Personnel is supported by substantial evidence: (1) Appellant voluntarily enlisted in the Naval Reserve of the United States on June 7, 1961 (Resp. A, pp. 1, 3); (2) In January, 1964, appellant agreed to extend his enlistment for a period of four years in consideration of being deferred from active duty for three years, upon certain conditions (Resp. A, p. 2); (3) From date of enlistment in June, 1961, through January, 1966, appellant participated in Naval Reserve training (Resp. A, pp. 5, 18); (4) On June 2, 1965, appellant acknowledged that he could expect his orders for active duty in September, 1965 (Appellant's Service File, p. 7 -- Service File is not a part of Record on Appeal); (5) In July, 1965, appellant applied for Officers' Candidate School (Resp. A, pp. 33-34); and (6) in September, 1965, prior to September 18, 1965,

appellant stated in writing he wanted to perform his active duty as a noncombatant (Resp. A, pp. 21, 33). The District Court was cognizant of the foregoing (Tr. I, p. 71).

While appellee submits that there is substantial evidence to support the Navy's decision herein, appellee contends that the District Court properly applied the "basis in fact" test, as in Selective Service cases. Witner v. United States, 348 U.S. 375 (1954); Parrott v. United States, 370 F.2d 388, 396 (9th Cir. 1966).

CONCLUSION

For the reasons stated, the Order appealed from should be affirmed.

Respectfully submitted,

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Chief of Civil Division,

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Assistant U. S. Attorney,

Attorneys for Appellee,
Capt. Paul R. Engle.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James D. Murray
JAMES D. MURRAY

APPENDIX "A"

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 16454

DAVID W. BROWN, Private E-2 RA 11 797 464,

Appellant,

v.

HON. ROBERT S. McNAMARA, Secretary of Defense;
HON. STANLEY R. RESOR, Secretary of the Army;
MAJOR GENERAL JOHN M. HIGHTOWER, Commanding
General, U. S. Army Training Center, Infantry, U. S.
Army, Fort Dix, New Jersey,

Appellees.

On Appeal From the United States District Court
For the District of New Jersey

Argued October 5, 1967

Before Staley, Chief Judge, and Maris and Van Dusen,
Circuit Judges

OPINION OF THE COURT
(Filed November 24, 1967)

By VAN DUSEN, Circuit Judge

This appeal concerns the jurisdiction of the Federal Courts
over persons in the military service. ¹ The case is before the

¹ The background of this case is set out in considerable detail
in the able opinion of Judge Lane: Brown v. McNamara, 268 [sic]
F. Supp. 686 (D.N.J. 1967).

court on appeal from an order of the District Court denying a petition for a writ of habeas corpus, requesting the discharge of appellant from the Army on the grounds of his being a conscientious objector. Appellant (Private David W. Brown) voluntarily enlisted in the Army. The petition alleges that his religious beliefs "crystalized" two weeks after beginning his basic training at Fort Dix, New Jersey, and he refused to proceed further with combat training.

Army Regulations (AR 635-20) provided a procedure for people in Private Brown's position to request discharge from the Army on the grounds of conscientious objection. Private Brown submitted the required forms, together with the required documentation, and complied fully with the procedure, including the chaplain's and psychiatrist's reports. This internal Army regulation was adopted pursuant to a Defense Department directive designed to establish uniform procedures in all branches of the Armed Services for considering discharge requests on the grounds of conscientious objection (DOD No. 1300.6). The administrative system contemplated by the Defense Department and enacted by the Army regulation is fairly detailed. But in general terms it provides for a "discretionary" discharge, consistent with the national policy of not inducting conscientious objectors. Since members of the Armed Forces are involved, however, such discharge requests will be recognized only "to the extent practicable and equitable". Certain guidelines and rules are given for exercising this discretion, including: the claimed objection cannot stem from

beliefs existing before entering the Armed Forces; each service's headquarters will decide, after consideration of the peculiar circumstances of the case; great care should be used to insure the sincerity of the claim; the same standards used by the Selective Service System for pre-induction claims should be used (an advisory I-O classification from the Selective Service will be a normal prerequisite for discharge, particularly where the applicant has less than two years of service); and no absolute objective measurements can be applied across the board. The procedure suggested allows for assignment to non-combatant duties in certain cases and the Army regulations provide for assignment to duties providing the minimum conflict with professed religious beliefs pending final decision on an application for discharge.

Private Brown's application did not receive a favorable advisory classification of I-O nor I-A-O (allowing a non-combatant assignment) from the Director of Selective Service, despite several letters submitted on his behalf from outside sources attesting to his religious convictions. Both the Chaplain's report and the Commanding Officer's recommendation of disapproval made reference to Brown's contact with pacifist organizations and persons, and both concluded that his beliefs were based upon these contacts, as opposed to religious convictions. Based on this recommendation, the documents attached to the application, and the Selective Service opinion, the Adjutant General denied discharge and, accordingly, Private Brown was ordered to draw combat training equipment. Brown refused. After hearing by a Special

Court Martial and suspension of his sentence by the reviewing officer, a second refusal to obey orders led to new charges. Instead of convening a second court martial, suspension of the original sentence of three months' confinement at hard labor was vacated and Brown was ordered into confinement. ^{2/} The petition for a writ of habeas corpus followed, alleging that Brown was being held in violation of his rights. In general terms, appellant alleged that the Army violated its own procedure, made an incorrect determination of Brown's conscientious objector status, and followed an administrative procedure that denied Brown constitutionally required procedural and substantive due process, as well as equal protection of law.

The lower court denied any relief by way of habeas corpus, finding no constitutional infirmity in the administrative procedure used by the Army and no jurisdiction to review their factual determination under that procedure. We agree with the excellent opinion of Judge Lane on the issue of procedural due process. ³

2 At oral argument, counsel for appellant indicated that Private Brown again refused to obey orders after his three-month sentence and thus incurred another court-martial sentence, 18 months at hard labor, to be served at Fort Leavenworth, Kansas. No good reason has been shown why transfer of petitioner-appellant Brown from Fort Dix should be restrained, as orally requested by his counsel at argument. It is noted that no written motion for such extra relief has been presented.

3 Brown v. McNamara, supra. We use the dichotomy of "procedural" and "substantive" due process in this case only to help emphasize what we do and do not decide on this appeal. We realize fully that the distinction is not always a clear line and may well break down under certain circumstances.

Regardless of the constitutional underpinnings of the right to classification as a conscientious objector, it is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntarily enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life. We therefore affirm the conclusion "that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation." See Brown v. McNamara, supra, at 691.

Inherent in this conclusion and our approval is a decision that the Federal Courts have jurisdiction to make this review of procedural due process just as they would if the question were one of statutory construction. E.g., Harmon v. Brucker, 355 U.S. 579, 581-2 (1958).

We do not decide, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, we do not hold that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his active service. With this view of our jurisdiction, we reject the appellant's petition on the basis of our examination of this particular record. ⁴

⁴ Such concerns as interference with the military are not irrelevant or necessarily of slight importance. See Warren, The Bill of Rights and the Military, 37 N.Y. U. L. Rev. 181, 197 (1962).

Whether or not our review of the question of substantive due process which may be presented in any case of a person voluntarily enlisted in military service is as broad as or limited to the "basis in fact test," Estep v. United States, 327 U.S. 114, 122-23 (1946); United States v. Seeger, 380 U.S. 163, 185 (1965), or whether an indispensable prerequisite to our exercise of jurisdiction is always the complete exhaustion of military remedies, Gusik v. Schilder, 340 U.S. 128 (1950),⁵ we need not decide in this case.

The present record contains sufficient evidence to show that the Adjutant General's denial of discharge for reasons of conscientious objection was not arbitrary, or capricious, or irrational.⁶ We draw specific attention to the advisory opinion of the

⁵ See, also, Beard v. Stahr, 370 U.S. 41 (1962). Claimed "conscientious objector" status can always be raised as a defense to prosecution for refusing to obey orders. From any judgment or sentence, comprehensive appeal is available. 10 U.S.C. §§ 817, 859-876. This includes resort to a board of review (10 U.S.C. § 866), to the Court of Military Appeals (10 U.S.C. § 867), to the Secretary of the Army (10 U.S.C. § 874), and petition for a new trial (10 U.S.C. § 873). Appellant has not pursued all these available remedies. On this record, we are unwilling to expand the principle of Dombrowski v. Pfister, 380 U.S. 479 (1965), in order to assure for appellant determination of any constitutional issues without exposure to court martial proceedings. See Noyd v. Mc-Namara, 378 F.2d 538, 540 (10th Cir. 1967). Counsel for appellant have referred us to the case of United States v. Taylor, No. CM 413709 (Board of Review, U.S. Army, October 24, 1966), where conscientious objection was deemed no defense to a refusal to obey orders and thus evidence on the determination of a claim as a conscientious objector was held properly excluded. We do not have the record in this case and note that this case is not a determination by the highest Army appellate authority.

⁶ See Burns v. Wilson, 346 U.S. 137, 142-3 (1953), where the court noted in an analogous situation:

"For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers - as well as civilians - from the
(continued)

Director of Selective Service, to the full compliance of the Army with AR 635-20, to the requirements in DOD 1300.6 that claims will be recognized "to the extent practicable and equitable" and that claims will not be entertained if the conscientious objector's beliefs existed prior to entering the Armed Forces, to the fact that Private Brown made his claim two weeks after beginning basic training (six weeks after enlisting), to the statement of the Brigade Chaplain that "I am of the opinion that his beliefs, though sincere, are based on contacts he has had with Pacifistic Organizations and individuals rather than on Religious Convictions," and to the opinion of the Commanding Officer that Private Brown's beliefs were "mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs." ⁷

6 (continued) crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."

7 It is noted that in his application for discharge, appellant included under "Pacifist Training": personal contact with professed pacifists, reading of literature from SANE and the World Federalists, contacts with peace groups at Yale, including "Alternative" and "Americans for Reappraisal of Far Eastern Policy," and reading the beginning of MacLuham, Understanding Media: The Extension of Man. Although, as stated above, we do not here decide the applicability of the "basis in fact" test to classification of enlistees after entering active service, this case does fulfil the requirements under the test suggested in Dickinson v. United States, 346 U. S. 389, 396 (1953), there being a showing that the Army's finding was supported by "some affirmative evidence," and the requirements suggested in United States v. Seeger, supra, at 179-80, since the record contains affirmative evidence that the appellant's opposition to military service was not "based on grounds that can fairly be said to be 'religious.' "

It is also noted that the Commanding Officer believed that
(continued)

Such factors constitute a sufficient basis for the Army's decision within the guidelines of DOD 1300.6. In this posture, Private Brown's petition presents no claim sufficiently unique, nor does his position show such injustice, that we are compelled to interfere in whatever internal avenues of appeal are available to him within the Army.

For these reasons, the petitioner is not now entitled to a writ of habeas corpus and we will affirm the decision of the court below.

STALEY, Chief Judge, Concurring.

I concur in the affirmance of the district court's denial of the writ. I also agree with the majority opinion insofar as it affirms the finding of the district court that the administrative procedure used by the Army did not deny the appellant procedural due process. However, I agree with the district court's conclusion that federal courts should refuse to accept subject matter jurisdiction to pass on the factual adequacy of the Army's decision. 263 F. Supp. at 692-93. As stated in the opinion below, the exercise of such jurisdiction has properly been held to be unduly disruptive of the operation of the armed forces, and contrary to the doctrine of the separation of powers. Orloff v. Willoughby, 345 U.S. 83,

7 (continued) "prior to his enlistment into military service, and since . . . [that time] Brown has been subjected to reading numerous papers and pamphlets concerning the 'Pacifist Program' currently being demonstrated in this country." As pointed out above, conscientious objector beliefs existing prior to entry into the Armed Forces are not grounds for discharge under AR 635-20.

93-94 (1953); Harmon v. Brucker, 243 F.2d 613, 619 (C.A.D.C., 1957) rev'd other grounds, 355 U.S. 579 (1958).

MARIS, Circuit Judge, concurring in part and dissenting in part.

I concur with the opinion of the court in holding that the federal courts have power to review the substantive elements of the military proceedings under which Brown was denied discharge from the Army as a conscientious objector. But I cannot agree that upon such review the denial of his discharge must be upheld. For I think that the military authorities made a basic error in concluding that the fact that Brown's pacifist beliefs were based on contacts with or influences made upon him by pacifist persons and organizations was evidence that they were necessarily not religious beliefs. Quite the contrary may very well have been the case. For it can hardly be denied that the pacifist position of opposition to war stems from the Divine commands not to kill but to love one's enemies and that through the centuries most of those who have taken the pacifist position have done so on the basis of their religious beliefs. Indeed recognition of this fact is the basis of the exemption from military service and training which is granted by the Selective Service Act to conscientious objectors. As to the broad meaning of religious belief in this connection see United States v. Seeger, 1965, 380 U.S. 163.

It is true, of course, that there are pacifists who are motivated solely by political, sociological or philosophical views. But it is quite erroneous to assume, as the military authorities did in

Brown's case, that pacifist persons are necessarily not religiously motivated and that organizations supporting the pacifist position are necessarily organized and led by persons whose pacifist views stem from other than religious conviction, and to conclude from that assumption that the contacts with Brown and influences upon him by such persons and organizations did not involve religious grounds of opposition to war. On the contrary I believe it to be a fact that in this country most pacifists are religiously motivated, as the Seeger case defines such motivation, and that most organizations supporting the pacifist position are largely composed of and led by individuals so motivated. The military authorities had before them no evidence as to the actual basis of the pacifist beliefs of the persons and organizations with which Brown was in contact or as to the nature of the views which they expressed to him. Since their erroneous assumption that these must necessarily have been non-religious infects the whole record and obviously influenced their decision, I would reverse.

A True Copy:

Teste:

Clerk of the United States Court of
Appeals for the Third Circuit.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGLE,

Appellee.

FILED

MAR 11 1968

WM. B. LUCK, CLERK

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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MAR 11 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGLE,

Appellee.

APPELLANT'S REPLY BRIEF

OPENING STATEMENT

Appellee contends, in effect, that the District Court had no jurisdiction in this matter because:

1. Appellant as a voluntary enlistee on active duty was not in such "custody" as to make the Writ of Habeas Corpus applicable (Resp. Brief, pp. 11-14). 1/

1/ In conformity with the system of parenthetical references used in Appellee's Opening Brief and Appellee's Brief, the following abreviations will be used:

Matter in the Transcript of Record: Tr. 1, p. ____;
Matter in the Reporter's Transcript: Tr. II, p. ____;
Matter found in exhibits admitted into evidence as:
Petitioner's Exhibit I (Department of Defense
(Continued)

2. A federal district court does not possess the authority to review procedures followed by the Navy in handling requests for discharge on the grounds of conscientious objection (Resp. Brief, pp. 12-14).

It is further argued by appellee:

1. That appellant's letter of January 24, 1967, with attachments and incorporated matter did not constitute a new request for discharge (Resp. Brief, pp. 14-17).

2. That the following of applicable regulations by the Chief of Naval Personnel in processing appellant's request for discharge dated September 18, 1965, satisfies the procedural requirements as to the letter of January 24, 1967 (Resp. Brief, pp. 17-19).

3. That the voluntary enlistment of appellant in 1961, and other actions on the part of appellant, all prior to September 18, 1965, constitute a basis in fact for finding that the appellant should be classified as a non-combatant on January 24, 1967 (Resp. Brief, pp. 20-21).

1/ Continued:

Directive 1300.6(1962): Pet. I, p. ____;
Petitioner's Exhibit II (Part C-5210, Bureau of Naval Personnel Manual): Pet. II, p. ____;
Petitioner's Exhibit III (letter from Chief of Naval Personnel to appellant's counsel, dated March 23, 1967): Pet. III, p. ____;
Respondent's Exhibit A (Certified Military Record relative to appellant's request for discharge): Resp. A, p. ____;
Parenthetical references to Appellant's Opening Brief: Brief, p. ____; and
Parenthetical references to Appellee's Brief: Resp. Brief, p. ____.

Finally, appellee contends that the failure of appellant to file a "Traverse" to appellee's Answer and Return alleging that no new relevant matter was added by the letters of appellant after September 18, 1965, requires a finding to that effect here (Resp. Brief, p. 16).

Appellant proposes to deal first with the technical effect, if any, of his failure to file a "Traverse", then to consider the question of jurisdiction, and to conclude with a comment on the other points raised by appellee.

I

THE MATERIAL ALLEGATIONS OF THE ANSWER AND RETURN ARE TRAVERSED (OR DENIED) BY THE PETITION.

Appellee suggests that appellant was bound by some rule or principle of law to file a document entitled "Traverse to the Answer and Return" (Resp. Brief, p. 16). Title 28 U.S.C. §2248 does not purport to require such a document, but does require that material allegations of the Answer and Return, where not denied by the Petitioner, or by a Traverse, where the Petition lacks an effective contravening allegation, "shall be accepted as true except to the extent that the judge finds from the evidence that they are not true."

Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953), cited by appellee (Resp. Brief, p. 17), does not support his position. In relevant part, that decision reads as follows:

"Under the common law, as adopted by statute, 'The

allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.' 28 U.S.C.A.

§2248. No evidence is necessary to support the allegations of a return. It imports verity and must be taken as true, unless directly put in issue by the pleadings. *Crowley v. Christensen*, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620; *United States ex rel. D'Istria v. Day*, C.C., 20 F.2d 302; *Graham v. Carr*, 9 Cir., 112 F.2d 908; *United States ex rel. Catalano v. Shaughnessy*, 2 Cir., 197 F.2d 65. An issue joined by the petition and the return must be determined upon proof. See *Stewart v. Overholser*, 87 U.S.App.D.C. 402, 186 F.2d 339. But here, the allegations with reference to the entry in 1944 stand untraversed and un rebutted, and we think they must be taken as true." (Emphasis added)

The petition herein alleges:

"g. On January 24, 1967, petitioner submitted his third request for discharge by reason of conscientious objection pursuant to the provisions of Bureau of Naval Personnel Manual Article C-5210. Said request reasserted by reference the matters

set forth in his previous requests for discharge and supplemented the same with additional documentary evidence; said documentary evidence included letters from two chaplains assigned to petitioner's unit, both confirming the belief in petitioner's sincerity and recommending his discharge as a conscientious objector." (Tr. I, pp. 2-3)

Appellee argues:

"In the sworn-to Answer and Return on file herein (Tr. I, pp. 14-19), appellee alleges that appellant's requests of February 2, 1966 (Tr. I, p. 15), and January 24, 1967 (Tr. I, p. 16), were requests for reconsideration of appellant's previous request for discharge of September 18, 1965, and by such requests for reconsideration, no new relevant matter was added to said initial request." (Resp. Brief, p. 16)

Obviously the allegations of the Answer and Return are traversed (denied) by the Petition. The issue as to the nature of the letter of January 24, 1967 as a new request for discharge, or as a mere request for reconsideration of a previous request for discharge, was squarely before the trial court.

Appellant contends that the trial court erred in its resolution of that issue.

II

THE DISTRICT COURT HAD JURISDICTION TO GRANT THE WRIT OF HABEAS CORPUS.

A. APPELLANT IS IN "CUSTODY" WITHIN THE MEANING OF 28 U.S.C. §2241.

The statute under which appellant asserts federal jurisdiction is 28 U.S.C. §2241, the pertinent portion of which prohibits the granting of the writ unless a "prisoner" is "in custody in violation of the Constitution or laws or treaties of the United States."

Is a member of the Naval Reserve, on either active or inactive status, "in custody?"

Initially, it should be noted that the Court of Appeals for the Third Circuit in its decision in Brown v. McNamara, #16454 (November 24, 1967), which was appended to Appellee's Brief as Appendix "A", made the following disclaimer:

"The lower court denied any relief by way of habeas corpus, finding no constitutional infirmity in the administrative procedure used by the Army and no jurisdiction to review their factual determination under that procedure. We agree with the excellent opinion of Judge Lane on the issue of procedural due process. ³

"³ Brown v. McNamara, supra. We use the dichotomy of 'procedural' and 'substantive' due process in this case only to help emphasize what we do and do not decide on this appeal. We realize fully that the distinction is not always a clear line and may well break down under certain circumstances.

"Regardless of the constitutional underpinnings of the right to classification as a conscientious objector, it is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntarily enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life. We therefore affirm the conclusion 'that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation.' See Brown v. McNamara, supra, at 691.

"Inherent in this conclusion and our approval is a decision that the Federal Courts have jurisdiction to make this review of procedural due process just as they would if the question were one of statutory construction. E. g., Harmon v. Brucker, 355 U.S. 579, 581-2 (1958)."
(Emphasis added) (Resp. Brief, pp. A-4 to A-5)

The significance of that disclaimer is accentuated by the fact that Brown was himself an enlistee and that the case came before the Third Circuit by way of appeal from the denial by the District Court of a petition for writ of habeas corpus -- an exact procedural parallel to the instant case.

The court in Brown found that the petitioner's request for discharge was handled in "full compliance of the Army with AR 635-20" (Resp. Brief, p. A-7); the Army regulations cited are similar to the regulations applicable here in carrying out the

directives of the Department of Defense (DOD 1300.6; Pet. I). Thus the Brown decision deals with a situation similar in some respects to that of appellant but clearly distinguishable as to the manner in which the appropriate authority (here Chief of Naval Personnel) handled the pertinent request for discharge.

Habeas Corpus has long been used as a means of testing the legality of induction into the military service. See United States v. Anderson, 24 Fed. Cas. 813 (No. 14,449) (C.C.D. Tenn. 1812). Or, as the court said in Estep v. United States, 327 U.S. 114, 124, 90 L.Ed. 567, 574 (1945): " . . . It has been assumed that habeas corpus is available . . . after a registrant has been inducted into the armed services. . . ."

The trial court in United States ex rel Orloff v. Willoughby, 104 F. Supp. 14 (W.D. Wash., 1952), affirmed 195 F.2d 209, affirmed 345 U.S. 83, 97 L.Ed. 842, denied habeas corpus to a doctor, after induction into the Army, who contended that his custody was unlawful because he was not being used in a medical category. The court held that habeas corpus was a proper procedure, but that the Federal District Court was without power to require the Army to grant a commission to the petitioner, since the controlling statute did not require that doctors be used in a medical category. In reviewing that opinion, this Honorable Court did not contravene Judge Lindberg's statement that " . . . the Petitioner here is clearly within his rights in coming into Court seeking a writ of habeas corpus to determine his status," but asserted: "[t]he fundamental question before us is one of statutory construction." 195

F.2d at p. 210.

Appellant respectfully submits that the law on this point was accurately and concisely stated by Judge Weinberger in In Re Phillips, 167 F. Supp. 139 (S. D. Calif. 1958) at p. 141:

"The Court is of the opinion that the petitioner is 'in custody' within the requirements of Section 2241 of Title 28 U.S.C.A. and that the application for writ of habeas corpus is a proper remedy to test the legality of his detention in the Marine Corps. United States ex rel. Orloff v. Willoughby, D. C., 104 F. Supp. 14, affirmed 9 Cir., 195 F.2d 209, affirmed 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842."

Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967), is not to the contrary, since it turned upon a failure of the petitioner to exhaust administrative remedies.

Appellant is thus "in custody" within the meaning of 28 U.S.C. §2241, as a member of the Naval Reserve, whether he be on active duty, or on inactive status but subject to momentary recall to active duty.

B. FEDERAL DISTRICT COURTS DO HAVE
 JURISDICTION TO REVIEW PROCEDURES
 FOLLOWED BY THE NAVY IN HANDLING
 REQUESTS FOR DISCHARGE.

In his Opening Brief appellant quoted from Brown v. McNamara, 263 F. Supp. 686 (D. C. N. J. 1967) in support of his contention that the District Court had jurisdiction to review the

ruling of the Chief of Naval Personnel in this matter. More recently, the Court of Appeals for the Third Circuit has clearly expressed itself as in agreement with appellant's contention:

"We do not decide, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, we do not hold that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his active service. With this view of our jurisdiction, we reject the appellant's petition on the basis of our examination of this particular record. ⁴

4 Such concerns as interference with the military are not irrelevant or necessarily of slight importance. See Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 197 (1962)." (Emphasis added) (Resp. Brief, pp. A-4 - A-5)

In Harmon v. Brucker, 355 U. S. 579, 2 L. Ed. 2d 503, petitioners, having been discharged from the Army with other than honorable discharges, sought declaratory relief and a writ of mandate directing the Secretary of the Army to issue to them honorable discharges. The District Court denied the relief sought, and the United States Court of Appeals for the District of Columbia affirmed. The Supreme Court took the view that the Federal District Court had jurisdiction to review the propriety of the action of

the Secretary of the Army:

"Generally, judicial relief is available to one who has been injured by an act *[355 US 582] *of a government official which is in excess of his express or implied powers. *American School of Magnetic Healing v. McAnnulty*, 187 US 94, 108, 47 L.ed 90, 96, 23 S Ct 33; *Philadelphia Co. v. Stimson*, 223 US 605, 621, 622, 56 L ed 570, 577, 578, 32 S Ct 340; *Stark v. Wickard*, 321 US 288, 310, 88 L ed 733, 748, 64 S Ct 559. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries. Cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123, 159, 160, 95 L ed 817, 847, 848."

In May, 1967, the Supreme Court cited Harmon v. Brucker in support of the proposition "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the intent of Congress." Abbott Laboratories v. Gardner, 387 U.S. 140, 18 L.ed.2d 681.

Clearly, Federal District Courts do have jurisdiction to review procedures followed by the Navy in handling requests for discharge which are authorized under existing Navy regulations.

III

THE FAILURE OF THE NAVY TO PROCESS APPELLANT'S LETTER OF JANUARY 24, 1967, IN ACCORDANCE WITH REGULATIONS RENDERS HIS CONTINUED CUSTODY UNLAWFUL.

A. THE CHANGE IN THE DEPTH OF APPELLANT'S CONVICTIONS IS A CHANGE IN STATUS BY BOTH SELECTIVE SERVICE AND NAVY STANDARDS.

Appellee argues that, by appellant's request for discharge of January 24, 1967, "not a single substantial factor is added to his requests of September 19, 1965 and February 2, 1966." (Resp. Brief, p. 15). That assertion overlooks the distinction between the evaluation of appellant's position by his chaplain in September, 1965:

"In view of the above, I must affirm my very serious question as to the sincerity of his declared position, and cannot, in conscience, recommend that he be granted the status of 'conscientious objector'. I feel that his earlier desire for 'non-combatant' status is reliable as it is borne out in the fact that he was striking for a hospital corpsman rating." (Resp. A, p. 34)

and the evaluations by his chaplains in January, 1967:

Chaplain Bigler (Resp. A, p. 43):

"I am convinced of his sincerity and have reviewed the logical process with him which requires he take this stand."

"I strongly recommend that MINASIAN'S request for discharge as a conscientious objector be granted for the good of the man and the Naval Service."

Chaplain Six (Resp. A, p. 44):

"It is my opinion MINASIAN is sincere and devoted to his personal convictions concerning military service. His position is now marked by an unwillingness to serve even as a non-combatant."

The fluid nature of personal convictions was discussed at length by the Court of Appeals for the Second Circuit in United States v. Gearey, 368 F.2d 144 (1966), cert. denied 36 Law Week 3204, rehearing denied 36 Law Week 3242, where a registrant under the Selective Service system filed his application for classification as a conscientious objector (SSS Form No. 150) after he had received an order to report for induction. The Selective Service Board, pursuant to a regulation (32 C.F.R. §1625.2), refused to reopen his classification, and Gearey was convicted for refusal to submit to induction. The Court of Appeals reversed the conviction and remanded for further proceedings.

"The considerations are quite different, however, when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim which had not previously matured. Section 6(j)

does not set any time limit by which an applicant's conscientious objections must fully crystalize in his mind. It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice,¹⁰ although the belatedness of a claim may be a factor in assessing its genuineness. See Clancy & Weiss, 'The Conscientious Objector Exemption,' 17 Maine L. Rev. 143, 147 (1965); Note, 'Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption,' 72 Yale L.J. 1459, 1462 (1963). The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments. The long history of exempting conscientious objectors, coupled with the specific statutory right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures - even if this occurs after an induction notice is sent but before actual induction - be entitled to have his application considered by the Local Board.¹¹ In light of this, the Local Board must first determine when an applicant's

beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened.¹² If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred 'resulting from circumstances over which the registrant had no control,' and he would be entitled to be reclassified by the Local Board.¹³

"10. The Defense Department has recognized that a genuine claim of conscientious objection may arise even after induction. The various military services have therefore provided procedures for investigating such claims, and in appropriate cases for granting discharges. See Department of Defense Directive No. 1300.6, ASD(M) (Aug. 21, 1962); Army Regulation No. 635-20 (Nov. 9, 1962); Department of the Navy, Bupers Instruction 1616.6 (Nov. 15, 1962); Marine Corps Order 1306.16A (Oct. 16, 1962); Air Force Regulation No. 35-24 (March 8, 1963).

"11. Any other conclusion would result in the anomalous situation that individuals whose claims of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for deferment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied

by Selective Service prior to induction cannot be entertained.

"12. This result is dictated not only by §1625.2, but in most cases by §1625.1(b) as well. 'Each classified registrant and person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification * * *.' 32 C.F.R. § 1625.1(6). See *Keene v. United States*, supra, 266 F.2d at 384. In *United States v. Corliss*, 280 F.2d 808, 812, cert. denied, 364 U.S. 884, 81 S.Ct. 167, 5 L.Ed.2d 105 (1960), we inferentially approved the application of that section to conscientious objector claims.

"13. See *Keene v. United States*, 266 F.2d 378, 384 (1959). But see *United States v. Taylor*, 351 F.2d 228 (6 Cir. 1965); *Boyd v. United States*, 269 F.2d 607 (9 Cir. 1959); *United States v. Schoebel*, 201 F.2d 31 (7 Cir. 1953)."

United States v. Gearey, 368 F.2d 144 at 150.

The evidence presented here points unequivocally to the conclusion that appellant's beliefs "matured" during his period of active duty: in September, 1965, he was a conscientious objector to combatant service; in January, 1967, he became a conscientious objector to both combatant and non-combatant military service. A change in status cognizable under both Selective Service and Navy standards, thereby occurred.

B. THE LETTER OF JANUARY 24, 1967,
MUST BE TREATED AS A NEW REQUEST
FOR DISCHARGE.

Appellant concurs in the comment made by the trial judge:

"Surely the Navy Department should not be put to the fully detailed process, as a new request, of every letter a petitioner files arguing error in the decision

of the Chief of Naval Personnel, as to a prior request for discharge." (Tr. I, p. 77)

But where the new request establishes a "maturing" of a conscientious conviction, the new request is different in kind from a mere request for reconsideration of a previous request for discharge. Under such circumstances both the applicable regulations and the principles of due process require that the new request be processed "in a manner which provides equal protection of laws" (to quote Judge Lane in Brown v. McNamara, supra, 263 F. Supp. at p. 691) to all who present their views promptly as such views mature.

CONCLUSION

For the reasons stated, the Order appealed from should be reversed, and the Writ of Habeas Corpus should be granted.

Respectfully submitted,

RICHARD W. PETHERBRIDGE

Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Richard W. Petherbridge
RICHARD W. PETHERBRIDGE

DUPLICATE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANTONIO HECTOR MILLAN-GARCIA,
Appellant,

-VS-

UNITED STATES OF AMERICA
Appellee,

No. 22025 ✓

APPELLANT'S OPENING BRIEF

FILED

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JAN 10 1968

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1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3
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5 ANTONIO HECTOR MILLAN-GARCIA,

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7 -vs

No.

8 UNITED STATES OF AMERICA,

9 Appellee,
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12 APPELLANT'S OPENING BRIEF
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO HECTOR MILLAN-GARCIA,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court, Southern District, Central Division, denying petitioner naturalization as a citizen of the United States. The jurisdiction under which the court denied citizenship to petitioner is Title 8, U.S.C., Sec. 1421, et seq.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Secs. 1291-1294.

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HISTORY OF THE CASE

Petitioner is a native and citizen of the Republic of Mexico who entered this country with his mother in 1949 at San Ysidro, California when thirteen years of age. His certificate of admission with his mother executed pursuant to his entry, indicated the purpose of his entry as business and pleasure of one day.

The record discloses that his mother entered as a permanent resident. Petitioner's residence in the United States has continued to date. He was reared and educated here.

Arriving at military age, he enlisted in the Army of the United States and served in an active status from March 28, 1955 to April 1, 1957, and subsequently was honorably discharged. From April 2, 1957 to April 17, 1963 he was transferred to and served in the United States Reserves, from which he received an honorable discharge.

On August 12, 1963 petitioner filed with Immigration and Naturalization Service at Los Angeles his "Application To File Petition For Naturalization."

On October 24, 1963 a "certification of military or naval service," dated August 22, 1963 executed by J. C. Lambert, Major General of the United States Army, certifying petitioner's active military service and honorable discharge was filed with the Immigration Service.

The Immigration file contains a statement of

1 advice dated August 31, 1964 from the Naturalization Exam-
2 iner "B. H. Simpson" to petitioner that "no person shall be
3 naturalized against whom there is outstanding a finding of
4 deportability," and that "no petition for naturalization
5 shall be finally heard by a Naturalization court if there is
6 pending against petitioner a deportation proceeding."

7 On August 31, 1964 petitioner appeared for inter-
8 view. The Immigration file contains the following notation:
9 "Petitioner insists on filing." The file contains the fol-
10 lowing written memorandum:

11 "MEMORANDUM FOR THE FILE

January 23, 1964

12 Re: Antonio Hector MILLAN-Garcia

13 The facts in this case do not warrant the exercise
14 of my discretionary authority based on OI 242.1 (a)
15 and 103.1 (a) (1) (ii) to withhold the institution
16 of deportation proceedings to permit subject to
17 petition for naturalization.

18 /s/ GKR

19 George K. Rosenberg

20 District Director."

21 No action was taken by the Service upon petition-
22 er's application for naturalization.

23 On March 17, 1964 an O.S.C. and notice of hearing
24 in deportation was served on petitioner, predicated upon
25 grounds that he was never admitted to the United States as
26 an alien for permanent residence and was deportable under

1 the provisions of 241 (a) 1 as being excludable, having
2 effected his entry as an immigrant not in possession of a
3 valid visa in violation of 13 (a) of the Act of May 26,
4 1924.

5 On March 24, 1964 petitioner appeared before a
6 special inquiry officer in propria persona. The Service was
7 represented by its trial attorney. A hearing was thereupon
8 conducted and prosecuted by the Trial Attorney.

9 On April 3, 1964 the special inquiry officer ren-
10 dered his oral decision, determined that petitioner was ex-
11 cludable from the United States at the time of entry, and
12 ordered his deportation from the United States, and denied
13 him any discretionary relief.

14 An appeal was duly perfected to the Immigration
15 Board of Appeals and on May 21, 1964 the Board affirmed the
16 decision of the Special Inquiry Officer and dismissed peti-
17 tioner's appeal. Petitioner, within the time prescribed by
18 law, filed his petition for judicial review with the Ninth
19 Circuit. During the course of proceedings before the Cir-
20 cuit this court ordered, opposed by the Service, that peti-
21 tioner's naturalization proceedings record be filed to aug-
22 ment the deportation proceedings.

23 On April 5, 1965 this court rendered its opinion
24 entitled "Antonio Hector Millan-Garcia vs. Immigration and
25 Naturalization Service, No. 19361," affirming the order of
26

1 deportation and the actions of the Immigration Service relat-
2 ing to Petitioner's application for citizenship. (343 Fed 2d.
3 825)

4 Petitioner thereupon filed his petition for certiorari
5 with the United States Supreme Court. The petition was grant-
6 ed in the matter entitled Antonio Hector Millan-Garcia vs.
7 Immigration Service, 382 U.S.69, dated November 8, 1965,
8 and in a per curiam opinion held and directed:

9 "The motion for leave to proceed in forma
10 pauperis and the petition for writ of
11 certiorari are granted. The judgment is
12 vacated and the case is remanded to the
13 Court of Appeals upon examination of the
14 entire record and in light of the represen-
15 tations of the Solicitor General that the
16 petitioner will be afforded an opportunity
17 to apply for citizenship, and that there
18 will be no deportation proceedings until
19 such determination."

20 Pursuant to the order of the United States Supreme
21 Court and of the above entitled court, petitioner on January
22 31, 1966 filed his Petition for Naturalization with the
23 Immigration and Naturalization Service. On February 17,
24 1966 a preliminary examination was conducted by B. H.
25 Simpson, Naturalization Examiner, at which time petitioner's
26 military record was received in evidence, disclosing his

1 active military service from March 28, 1955 to April 1, 1957,
2 following which period of service he was transferred to the
3 United States Army Reserves, serving therein from April 2,
4 1957 to April 17, 1963 and was honorably discharged.

5 On March 14, 1966 a further examination was held
6 before B. H. Simpson, Naturalization Examiner. At the term-
7 ination of the proceedings, the matter submitted, the exam-
8 iner prepared and filed his findings of fact, conclusions of
9 law and recommendations, denying petitioner's application
10 for citizenship, finding that petitioner "had failed to estab-
11 lish that he is attached to the principles of the Constitution
12 of the United States and favorably disposed to the good order
13 and happiness of the United States", and on the further
14 ground that petitioner "has failed to establish that he can
15 take the oath of allegiance to the United States without
16 mental reservation."

17 The matter came on for hearing before the Hon.
18 Warren J. Ferguson, Judge of the U.S. District Court, for
19 hearing upon petitioner's application for naturalization
20 pursuant to 8 USCA 1447. The hearing was conducted before
21 said court on March 20 and 22, 1967 and was thereupon sub-
22 mitted.

23 On April 13, 1967 in a written opinion, the Dis-
24 trict Court denied petitioner's application for citizenship.
25 The petitioner thereupon perfected his appeal to this
26 Court.

PRELIMINARY STATEMENT

The Supreme Court of the United States, having vacated the judgment of this Court in Millan-Garcia v. Immigration and Naturalization Service, 343 F. 2d at 825 and remanded with the directive affording petitioner an opportunity to apply for citizenship and "that there will be no deportation proceedings until such determination," we verily believe that the denial of petitioner's motion to vacate the Order of Deportation made to the Immigration Service at the time of hearing of petitioner's application for citizenship was contrary to the Supreme Court directive. However, if this court should determine that the deportation hearings and the order of deportation are effective, we do then adopt herein our brief filed with this Court in Millan-Garcia vs. Immigration Service, supra, as part of this brief, and each point, authority and argument raised therein.

STATEMENT OF THE EVIDENCE

Initially the record of the deportation proceedings was received in evidence (Government's Exhibit 3 [RT-p. 8]), over objection by petitioner's counsel (RT, p.8-9); Application for Petition for Naturalization, Exhibit No. 4; Certificate from the Army of the United States, Exhibit No. 2 (RT p.9).

Petitioner Millan-Garcia testified before the District Court that he was born April 27, 1936 in Mexico,

1 brought to the United States by his mother when he was
2 12 or 13 years of age, believed that he was admitted for
3 permanent residence, but later ascertained that he had not
4 been so admitted. He volunteered to be drafted when 18
5 years of age, served actively from March 20, 1955 to April 1,
6 1957 and then was transferred to the Reserves and served in
7 that capacity until the year 1963 when he received his hon-
8 orable discharge. His family resided in the United States
9 and when picked up and confined by the Immigration Service,
10 was advised that he was being given an opportunity to ap-
11 ply for citizenship. He made such application to the De-
12 partment. In the year 1961 he joined an organization called
13 "Fair Play for Cuba" (RT 132-135). His understanding of
14 that organization was to inform people who were concerned
15 with the Cuban regime its goals, "what it was doing" (RT 136).
16 His activities were limited to attending meetings, listen-
17 ing to programs and distributing pamphlets at public meet-
18 ing places. He was a member of that organization for five
19 or six months, this being the extent of his participation
20 (RT 136). When he first joined the organization he believed
21 that Fidel Castro was a leader, not corrupt, who had the
22 desire "to see the social advancement of the people, not
23 only in Cuba but all Latin America." He was never a mem-
24 ber of the Communist or Socialist Party or the Socialist
25 Youth Movement (RT 137). When he first learned that Castro
26 had Communistic tendencies he began to think "very hard

1 about it". When he learned that Castro "if not a
2 Communist, that he had gone too far in his ties with the
3 Soviet Union", he disassociated himself from the organiza-
4 tion. He further testified that:

5 "Q All right. Now, will you tell the court now
6 in detail what your feelings are insofar as the Govern-
7 ment of the United States is concerned; whether or not
8 you are sympathetic to the Government of the United
9 States and whether or not you would uphold the con-
10 stitution of the United States.

11 A I am in favor of this type of government be-
12 cause I think it is more democratic. I am acquaint-
13 ed with the laws and the government of -- somewhat
14 acquainted with the laws and government of Mexico.

15 I have always thought -- or I had thought in the
16 past -- :I have seen many others follow a similar
17 example -- because this is the only way that I can
18 guide my thoughts. I read books on government,
19 they don't help me as much as if I was to present one
20 against the other or weigh one against another.

21 As far as my whole education and environ-
22 ment has been one of an American citizen, or an Amer-
23 ican. I can only see myself as an American.

24 Q Are you willing to uphold the Constitution
25 of the United States?

26 A Yes, I am.

1 Q Is there any mental reservations at all
2 in your mind?

3 A None at all.

4 Q Concerning your being favorably disposed --

5 A None at all.

6 Q Would you bear arms on behalf of the Govern-
7 ment of the United States?

8 A Yes, I would.

9 Q I assume that having borne arms actively and
10 in the Reserves for eight year -- that may mean or
11 be a needless question -- but are you again willing
12 to bear arms on behalf of the Government of the
13 United States?

14 A Yes, I am.

15 Q What has been your education?

16 A Well, my education hasn't been one of steady
17 education. It has been -- it has come in stages.
18 After my mother died in 1952 I discontinued my educa-
19 tion. I was sixteen at the time and started working.

20 I then went into the Service when I was eigh-
21 teen and came out when I was twenty. I proceeded to
22 get my -- acquire my high school diploma. After I
23 had done that I enrolled in junior college and went
24 there for about two years.

25 I dropped out of there for a few years and I
26 have gone back. And that is about the extent of my

1 education." (RT p.139, line 2 through line 23 p.140)

2 The Naturalization Examiner for the Immigration
3 Service then undertook cross examination. He thereupon made
4 inquiry concerning petitioner's marital status. The peti-
5 tioner replied that he was married and was married when
6 the N 400 application for citizenship was filed (RT 141).
7 He stated that he was presently not residing with his wife,
8 but had discussed legal action to terminate the marriage.
9 The Hearing Officer thereupon inquired of the petitioner
10 concerning Miss Rose Uyehara, who had testified on his behalf
11 and his relationship with this witness. Petitioner then
12 answered in the following vein:

13 "Q Mr. Millan, you I believe were present at the
14 time that one of your witnesses, namely, Miss Uye-
15 hara indicated that you had been intimately acquainted
16 during the year 1965, What was your relationship
17 with this witness?

18 A My relationship with her was a close relation-
19 ship. I did ask her to marry me.

20 Q Are you familiar with the term 'adultery'---

21 MR. MARCUS: Now, before --

22 THE WITNESS: You are going too far --

23 MR. MARCUS: Wait just a minute, please. Let
24 me take care of this.

25 Your Honor, unless counsel is prepared to back
26 that up and prove that, I assign this as prejudicial

1 misconduct.

2 THE COURT: Well, I think the way to proceed,
3 Mr. Simpson, would be the court would have to have
4 some type of evidence from you before the court would
5 permit you to proceed along that line." (RT p.142, line
6 23 through line 15, p. 143)

7 After some colloquy between Court and respective coun-
8 sel, the Court overruled petitioner's objection and the
9 witness was asked "have you ever been guilty of adultery? "
10 to which he replied, "No, I have not."

11 When asked if he agreed with Castro's resolution to
12 take over all Cuba during 1962 and 1963, the petitioner
13 replied that "I could see that she was sliding going
14 too far in some of his actions." When asked if he agreed
15 with Castro's resolution to take over all Cuba during 1959
16 and 1962, the witness answered "there were some things that
17 I disagreed with - there were things that I agreed with."
18 (RT-146). He was guided by Castro's speech and what he
19 spoke (RT 146). He agreed with his hopes for a better
20 future for the nations of Latin America. When asked if he
21 subscribed to the theory of Mr. Castro seizing from indivi-
22 dual economic organizations and activities and materials
23 without just compensation, the petitioner testified, "I did
24 not give that too much thought." When asked what he thought
25 about that now, the witness replied, "Well, I think that no
26 government should take somebody's property without proper

1 compensation." (RT 147) The witness testified that he
2 had attended meetings of socialist organizations (RT 149).
3 There were discussions of Marx and Lenin (RT 150). When
4 asked if he agreed with the theory of Marx and Lenin, his
5 response was "not really". The interrogation continued
6 further:

7 "Q Were you, however, at one time in favor of
8 an adoption of certain of these principles in Central
9 and Latin America?

10 A I don't see how I could have been when I
11 stated before that I was in the process of studying
12 these." (RT p.151, lines 15-19)

13 In connection with Nicaragua, the witness stated as
14 follows:

15 "Q Were you at any time, however, associated
16 with a rebel group in Nicaragua?

17 "A As far as I knew the person that I was as-
18 sociated with represented himself as being a mem-
19 ber of a rebel organization.

20 Q And the primary purpose was what?

21 A His primary purpose here was to see if there
22 were any means of getting support for the rebel
23 group.

24 Q To do what?

25 A To overthrow the Government of Nicaragua.

26 Q By force and violence?

1 A If necessary.

2 Q And what was the extent of your participation
3 with this group?

4 A As far as I was concerned it was not a group.
5 It was only an individual.

6 Q And what was the extent of your affiliation
7 with that individual?

8 A The extent of it was that we merely discussed
9 what could be done. And we more or less felt, or
10 went up to people that were sympathetic to the cause
11 to see if they were in favor of such.

12 Q And when was this?

13 A I believe this was in '62 or '61." (RT 152 line 23
14 through line 21, 153)

15 When asked concerning the 26 of July movement,
16 the witness testified it had the same purpose as Fair Play
17 for Cuba. The extent of his participation was none other
18 than to just go to the gatherings and discuss a few current
19 events of Cuba (RT 154, l. 24-25). In these meetings he
20 met a man by the name of Fuega, who claimed that he was a
21 Communist. This person took an active part in the discus-
22 sion of events in Cuba (RT 155). The witness testified that
23 the last time he saw him was in 1962-1963. The examiner
24 thereupon asked the witness concerning his testimony given
25 during the deportation proceedings and asked the witness if
26 he had not been asked the question would he participate in

1 an attack upon Cuba. The witness replied that he had an-
2 swered no, however, his answer now would be yes. He had
3 changed his mind because now it was obvious that "there is a
4 Communist regime in Cuba, whose aim is the same as that of
5 the Soviet Union." (RT 156, lines 24-26. He further testi-
6 fied:

7 "Q Mr. Millan, you have devoted some period of
8 your lifetime recently to studying these matters?

9 A Yes, I have.

10 Q And working these problems out in your own mind?

11 A Yes, I have.

12 Q You did study these problems, these various forms
13 of Government, is that right?

14 A Yes, I have.

15 Q You joined no political organizations, did
16 you?

17 A No, I don't.

18 Q Listen to this question very carefully.

19 Do you believe in the overthrow of the Govern-
20 ment of the United States by force and violence?

21 A No, I don't.

22 Q Are you favorably disposed to the welfare and
23 well being of the Government of the United States?

24 A Yes, I am.

25 Q And will you uphold and defend this Constitu-
26 tion?

1 A Yes, I would.

2 Q Without any mental reservations of any kind?

3 A Without any mental reservations of any kind.

4 Q Are you willing to take the oath of allegiance
5 today?

6 A Yes, I am." (RT, p. 158, line 15 through line
7 15, p. 159.)

8 The petitioner called witness Glen Michael on
9 his behalf (RT 43). He testified that he was employed
10 at North American Aviation Company for a period of six years.
11 His position required security clearance. He was a citizen
12 of the United States by birth, acquainted with Mr. Millan-
13 Garcia for approximately three years. Had seen him at
14 various intervals "sometimes every day" (RT 44). During
15 conversations with Mr. Garcia he discussed with him his
16 affiliation with the government of the United States. He
17 also discussed with him different forms of government.
18 The witness thereupon stated that in his opinion as a re-
19 sult of his conversations the petitioner was well disposed
20 to the government of the United States and believed that he
21 would make a good citizen of the United States.

22 On cross examination, the witness was asked if his
23 talks with the petitioner encompassed Fidel Castro. He was
24 then asked his opinion of Castro's political beliefs. The
25 witness replied "his politics are now known to be of Com-
26 munistic sympathies, at least (RT 46).

1 This witness further testified as follows:

2 "Q When did you first become acquainted with
3 Mr. Millan-Garcia? Was it after or prior to the
4 Bay of Pigs invasion?

5 A I would say it was after.

6 Q Now, at any time since the Bay of Pigs inva-
7 sion, to your knowledge, has he ever participated in
8 or advocated the principles espoused by Fidel Castro?

9 A Not to my knowledge.

10 Q Now, sir, you have indicated your belief that he
11 would be a good citizen of the United States.

12 A Yes, sir.

13 Q Tell us why.

14 A For several reasons. One is I think he is
15 truly concerned with the basic principles upon which
16 our government is constructed, is dedicated to the
17 principles of liberty and individual human freedom.

18 And then as a person I think he has exhibited
19 a strong moral character in supporting himself and
20 pursuing his education and in his general stability
21 of character.

22 Q Did you consider, sir, in formulating your
23 opinion that he would be well disposed toward the
24 Government of the United States, that he served as
25 a member of the Armed Forces of the United States
26 for some eight years?

1 A Yes, I gave that some consideration.

2 Q Is there any doubt in your mind at this time,
3 and during the period of your acquaintance with Mr.
4 Millan-Garcia that he would not be a person well dis-
5 posed toward the Government of the United States and
6 toward making a good citizen?

7 A There is no such doubt." (RT P. 53 1.11 through
8 line 16, p.54)

9 Rose Uyehara testified on behalf of the petitioner.
10 She was an American citizen by birth, 26 years of age, a
11 graduate of Marymount College, taught school in Chicago and
12 in Colombia South America and was currently employed by the
13 County as a social worker (RT 55); that she had a Bachelor
14 of Arts Degree and was studying for her Masters. Her courses
15 included psychology and Spanish. She knew the Petitioner
16 since 1961 or 1962.

17 This witness' testimony is of particular impor-
18 tance because of her personal acquaintance with the peti-
19 tioner, her educational and political background and her
20 connection with and employment by a governmental agency
21 engaged in social service. We particularly refer to her
22 testimony beginning on Page 63, line 2, to Page 65, line
23 4, wherein she testified:

24 "Q Do you agree that a person who becomes a
25 citizen of the United States should be well disposed
26 toward the good order and happiness of the United

1 States?

2 A Yes.

3 Q Do you believe that a person who believes in
4 the principles of Mr. Fidel Castro is such a person?

5 A Do you want 'Yes' or 'No'?

6 Q If it is possible of being answered 'Yes' or
7 'No' but I have no objection if you wish to elab-
8 orate.

9 A I think Mr. Millan has pointed out there are
10 many people within the United States now who at one
11 time felt that Fidel Castro was the best thing that
12 could have happened to Cuba.

13 I don't feel that simply because you agree or
14 disagree with the situation as it stands right now,
15 or after the war, that it doesn't mean you can't be a
16 good citizen.

17 One thing that bothers me so much about this,
18 Mr. Marcus has brought out the fact that Mr. Millan
19 has served in the Army. I don't think this neces-
20 sarily proves that a person is going to be a good
21 citizen, but it bothers me by the fact that in
22 serving in the United States Army Mr. Millan also
23 relinquished his rights as a Mexican citizen, yet
24 did not gain the indulgence of the United States to
25 make mistakes, to have useful ideas, ambitions and
26 hopes and perhaps follow through on these, as anyone

1 else living in the United States has a right to do.

2 You don't go to a person and say, you
3 don't have a good moral character, you have to leave.
4 We don't tell American citizens they have to leave
5 the country or they lose their citizenship.

6 Mr. Millan has lived in the United States
7 a number of years, served in the Army, yet do you
8 give him the right to make mistakes, to have ideals
9 and to try to follow through on them?

10 I think another factor that has to be
11 considered is that, well, boys or girls of his age
12 at a time when they usually become involved in acti-
13 vities such as, you know, Ban the Bomb or, you know,
14 taking a stand on Vietnam or taking a stand on
15 things like this.

16 But I think that what has to be considered
17 is the nature of Mr. Millan's youthful rebellion --
18 however you want to call it -- that it has a different
19 character because of the fact that it came when he
20 was almost grown up from Mexico. I don't think he ever
21 felt fully a part of the United States because with
22 his Latin background it makes this type of thing,
23 this hero-worship of Fidel Castro, the desire to
24 take part in political activities just natural to
25 him, just as it is natural for the youth of today
26 to take a stand on whatever would happen. But

1 because of this background it takes on a different
2 character. I think this has to be understood."
3 (RT, p. 63, line 2 through line 4, page 65)

4 BRIAN H. SIMPSON was called as a witness by peti-
5 tioner and testified that he was the general attorney, em-
6 ployed as Naturalization Examiner for the Department of
7 Justice (RT 76). He was acquainted with Mr. Millan-Garcia's
8 immigration file prior to the time that he conducted the
9 naturalization examination (RT-78). He had discussed the
10 case upon remand from the Circuit with his superior, George
11 K. Rosenberg, District Director of Immigration prior to
12 conducting his examination of the petitioner (RT 78). He
13 was acquainted with the opinion from the Circuit, the Board
14 of Immigration Appeals and the Supreme Court of the United
15 States (RT 79, 84, 85). He had formed no opinion prior to
16 his examination of petitioner whether he was precluded from
17 naturalization. When he read the record up to the time
18 that he had examined the petitioner in pursuance to the
19 application for citizenship he had not determined the veracity
20 of his testimony (RT-85). He predicated his questioning of
21 the petitioner upon the interrogation that had been pre-
22 viously conducted in the deportation proceedings (RT 86).
23 When the petitioner in the Naturalization proceedings under
24 oath stated he would bear arms against any Latin-American
25 Country, that he was well disposed toward the Government of
26 the United States and that he would uphold the Constitution

1 of the United States, the examining officer stated that he
2 did not believe him and had a "substantial doubt" as to his
3 statements in that regard. When he made inquiry of the
4 petitioner whether he believed in the principles of the Cu-
5 ban Government and was advised by the petitioner that he had
6 been "taken in" by joining the Fair Play for Cuba, but upon
7 learning that Mr. Castro was a Communist he severed any
8 connections or ties that he had at the time, he had a sub-
9 stantial doubt concerning the petitioner's statement, yet
10 he believed him when he testified that he was a member of
11 the Fair Play for Cuba. The petitioner had testified that
12 he had never been a member of the Socialist Workers or a mem-
13 ber of the Young Socialist League or any Nicaraguan group
14 (RT 89).

15 As a Naturalization Examiner he had conducted
16 some preliminary examination and interrogation of the peti-
17 tioner prepared findings of fact, conclusions of law and
18 recommendation against naturalization (RT 92). That he is
19 the officer appearing on behalf of the Immigration Service
20 and recommending against citizenship predicated upon his
21 findings and conclusions (RT 83); that regardless of what
22 information he found in the file concerning the deportation
23 proceedings he took an unbiased and unprejudiced view when
24 conducting his investigation.

25 In his statement of findings on page 3 when peti-
26 tioner refused to acknowledge that he believed Castro to be

1 a Communist at the time petitioner was associated with Fair
2 Play for Cuba in the years 1961 and 1962, the Examiner re-
3 quested the Court to take judicial notice of the fact that
4 Castro publicly announced in his speech held in Havana that
5 Cuba was a Community State, patterned after the principles
6 of Marx and Lenin. When asked by petitioner's counsel if
7 he had a copy of such statement by Castro made on December
8 3, 1961, or had shown the petitioner such statement during
9 those proceedings, his reply was, "No, I did not." Nor did
10 he introduce in evidence as part of the proceedings such
11 statement by Fidel Castro (RT 94).

12 When the petitioner made the statement during the
13 course of the examination that he refused to acknowledge that
14 at the time of his association with the "Fair Play for Cuba"
15 group he knew that the Cuban government was communist, he
16 doubted the petitioner's statement (RT 94 and 95).

17 When he conducted his examination he was acting as
18 a legal hearing officer in Naturalization for the Service
19 (RT 95) and that he was presently representing the Immigra-
20 tion Service before the Court, opposed to granting Natural-
21 ization; that he did not reach a final conclusion until he
22 had examined and reviewed the administrative file in deporta-
23 tion and the information contained in the preliminary exam-
24 ination of the petitioner, and thereupon arrived at his
25 recommendation (RT 96). He was aware that there was an
26 outstanding warrant of deportation against petitioner, al-

1 though he denied that he had any knowledge of the directive
2 of Goerge Rosenberg, the District Director, to deny the
3 petitioner his right to process his application for citizen-
4 ship.

5 Yet the District Director, George Rosenberg,
6 , present during the Court hearing did stipulate to the follow-
7 ing memo in the file, dated January 23, 1964 regarding the
8 petitioner:

9 "MR. MARCUS: This is dated January 23, 1964
10 regarding Antonio Hector Millan-Garcia. 'The facts
11 in this case do not warrant the exercise of my dis-
12 cretionary authority based on 232(1)(a) and 103(1)(a)
13 (11) in withholding the matter of deportation to
14 permit subject to petition for naturalization."

15 Signed George K. Rosenberg, District Director."

16 (RT p.102, lines 11-17)

17 Although having examined the file and its con-
18 tents he denied knowledge of this directive or that peti-
19 tioner had an application pending for naturalization
20 (RT 104). Thereupon the District Director again interceded
21 and stipulated that the application was on file. When he
22 was thereupon asked concerning the directive of the District
23 Director, the witness testified that:

24 "I at no time gave the directive which you
25 have just indicated to me any consideration
26 whatsoever." (RT 105)

1 He also had knowledge that there was an outstanding effect-
2 ive order of Deportation but denied knowledge that petitioner
3 would be deported. (RT 105) The District Director again
4 interceded in the proceedings, offering to stipulate that
5 the deportation proceedings were initiated on March 17, 1964.
6 The final Administrative Order of Deportation was entered by
7 the Board of Immigration Appeals on May 21, 1964, "had never
8 been withdrawn and was presently outstanding." (RT 109) (Em-
9 phasis added.) He had no reason to doubt petitioner's
10 statement that he had never been a member of the Communist
11 party; he had no reason to doubt the petitioner that he had
12 never been a member of the Socialist Workers Party or of
13 the Young Socialist Alliance organization. He doubted him
14 when he stated that he had severed all connection with the
15 organization known as "Fair Play for Cuba."

16 The following statement of the Naturalization
17 Examiner is particularly important as bearing on his state
18 of mind:

19 "First of all, he stated he was a member of
20 the organization known as Fair Play for Cuba. I
21 have no doubt as to this statement, no.

22 He indicated to me that he severed all
23 connections with this organization at a particular
24 period of time. I don't know as to that. But I
25 had my doubts as to the question.

26 But insofar as the ultimate recommendation

1 is concerned, I was primarily interested in whether
2 or not he was a member of the organization at a
3 particular time, and the extent of his participa-
4 tion in Fair Play for Cuba." (RT 113, lines 1-11)

5 The Examiner again reiterated his position that
6 he was "primarily interested in what he (the petitioner)
7 did when he was a member of "Fair Play for Cuba." When
8 asked to explain the activities of the petitioner when a
9 member of "Fair Play for Cuba" the witness stated that
10 "this petitioner testified to me that he had been instru-
11 mental in distributing pamphlets and other written material
12 - - or at least had advertised meetings when and if they
13 were to be held - - had obtained a movie which was purport-
14 ed by the Castro Government to depict the abortive Bay of
15 Pigs invasion." (RT 117-118)

16 Based upon this activity in exhibiting movies of
17 the Bay of Pigs invasion, "it raised a considerable doubt
18 in my mind as to the veracity of his statement" that he had
19 no knowledge Fidel Castro was a Communist, because "as pre-
20 viously indicated, the entire text of Mr. Castro's speech
21 was printed in the New York Times - -".

22 When the witness was further interrogated about
23 petitioner's oath of allegiance to the Government of the
24 United States when he entered military service the witness
25 testified that he had no personal knowledge of such require-
26 ment. The District Director again interceded and stipulated

1 that it was "customary" to take the oath of allegiance when
2 entering ,military service, (RT 120).

3 The witness further testified that he found no evi-
4 dence in petitioner's military record or background that he
5 was not loyal to the Government of the United States or had
6 at any time been disloyal, although he volunteered that he
7 found certain activities of the petitioner during his inact-
8 ive reserve enlistment "which raised substantial doubt as
9 to his loyalty." (RT 122) The witness further testified
10 that there was no indication in the petitioner's military
11 record showing a "lack of loyalty."

12 POINTS AND AUTHORITIES RELIED UPON

13 AND

14 ARGUMENT
15

16 THE EVIDENCE WAS INSUFFICIENT TO DENY NATURALIZATION
17

18 Petitioner, a veteran alien, who has served this
19 country for a period in excess of eight (8) years in active
20 and reserve status and was honorably discharged, has asked
21 to be made a citizen of the country to which he has given the
22 best years of his life. Our Government now says that he
23 does not deserve citizenship for the reason that he does not
24 come within the purview of the naturalization law and should
25 be deported from the United States. This position is sham
26 and should not require any extended argument to point up

1 the fallacy and absurdity of the position in which the deci-
2 sion of the lower court has placed the Government of the
3 United States. Is this the reward which the United States
4 desires to bestow upon an honorably discharged veteran, with
5 some eight years of service to the Government? Banishment
6 from the United States, separation from his family, home,
7 relatives and everything that makes life worth living, to
8 a country foreign to him and with which he has no ties,
9 through denial of the privilege of citizenship in this
10 country?

11 During the hearing conducted by the Special Exam-
12 iner on February 17, 1966, he indicated that the scope of
13 the examination on petitioner's application for citizenship
14 "whatever difficulty has occurred in conjunction with law
15 enforcement agencies - - - - and - - - - the issue that was
16 raised insofar as the decision - - - - rendered by the
17 Special Inquiry Officer to allow him or refuse him volun-
18 tary departure. The issue in this case does involve affil-
19 iation, or shall we say, an association with suspected mem-
20 bers of the Communist Party and other organizations that may
21 not be affiliated with the Communist Party. Now this will
22 be the scope of the questioning." (Emphasis added)

23 The hearing was thereupon continued to March 14,
24 1966, At this hearing a motion was made to terminate the
25 deportation proceedings under the ruling and directive of
26 the Supreme Court's decision. Thereupon the examining

1 officer ruled:

2 "The motion is denied on the specific ground, Mr.
3 Marcus, that the only issue which is before me as
4 a Designated Naturalization Examiner at this time
5 is the issue as to whether or not this man is eli-
6 gible for citizenship in the United States, there-
7 fore, that is the only issue to which I will direct
8 my questioning and the only issue upon which I will
9 listen to argument."

10 In Thompson vs. Immigration and Naturalization
11 Service, 332 Fed. 2d. 167, the Circuit reversed the District
12 Court, holding that past membership in the I.W.W. was not
13 sufficient to establish that the alien was not attached to
14 the principles of the Constitution and deposed to the good
15 order and happiness of the United States.

16 "(2) We hold the Findings of Fact of the Examiner
17 adopted by the trial court, and the Conclusions,
18 were clearly erroneous. The Finding as to the I.W.W.
19 is similar to the Finding as to the Socialist Work-
20 ers Party which we disapproved in Seythes v. Webb,
21 7 Cir., 307 F. 2d 905.

22 (3) Thompson's petition for naturalization should
23 have been granted. We therefore reverse and remand
24 with instructions that a certificate of naturaliza-
25 tion issue on the petition heretofore filed by
26 Thompson. Reversed and remanded."

1 In the matter of Seythes v. Webb, 307 F. 2d, 905
2 in deportation proceedings involving membership in the So-
3 cialist Party, the Court, in reversing a deportation order,
4 determined that the record failed to establish that the
5 Socialist Party advocates and teaches by its Declaration of
6 Principles and Constitution, the violent and forceful over-
7 throw of the Government of the United States within the test
8 laid down by Scales and Noto. Furthermore there is no sub-
9 stantial evidence showing that there is a party line within
10 the organization which advocates or teaches such overthrow.
11 We quote from the opinion:

12 "(2) The crucial question is the correctness of
13 the Board of Immigration Appeals' decision that the
14 Socialist Workers Party is an organization that ad-
15 vocates the overthrow of the Government of the United
16 States by force, violence, or other unconstitutional
17 means. Section 1251 (a) (6) (F) covers membership
18 in an organization that 'advocates or teaches * * *
19 the overthrow by force, violence, or other unconsti-
20 tutional means of the Government of the United
21 States* * *.' We believe it is significant to
22 note that this language and that of a part of the
23 Smith Act, 18 U.S.C. §2385 (the federal criminal
24 statute defining crimes for subversive activities)
25 are practically identical. The Smith Act covers
26 known membership in a 'society, group or assembly

1 by persons' who 'teach, advocate, or encourage the
2 overthrow or destruction' of the United States
3 Government 'by means of violence.'

4 While we recognize the distinction between a
5 prosecution under the Smith Act and a deportation
6 proceeding under Section 1251 (a)(6)(F), the dis-
7 tinction relates not to the subversive character
8 of the organization in question, but rather to the
9 quantum of proof required to convict or to deport.
10 In a Smith Act prosecution the proof must be beyond
11 a reasonable doubt, whereas in a deportation pro-
12 ceeding if the Attorney General's finding is based on
13 'reasonable, substantial, and probative evidence.'

14 Nonetheless, we believe the determination whether
15 an organization is one which advocates or teaches
16 the violent overthrow of the United States Govern-
17 ment ought not be made by a test which is different
18 in a deportation proceeding from that used in a
19 Smith Act prosecution.

20 With this in mind, we believe that the test
21 for deciding the question presented in the instant
22 case must be substantially the same as that laid
23 down in the two cases that have been decided by
24 the Supreme Court under the membership clause of
25 the Smith Act, *Scales v. United States*, 367 U.S.
26 203, 81 S.Ct. 1469, 6 L.Ed. 2d 782, and *Noto v.*

1 United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L. Ed. 2d
2 836. In Noto the Supreme Court said at 297, 81 S.Ct.
3 at 1521:

4 'We held in Yates (Yates v. United States, 354
5 U.S. 298, 77 S.Ct. 1064, 1 L. Ed. 2d 1356),
6 and we reiterate now, that the more abstract
7 teaching of Communist theory, including the teach-
8 ing of the moral propriety or even moral necessity
9 for a resort to force and violence, is not the
10 same as preparing a group for violent action and
11 steeling it to such action. There must be some
12 substantial direct or circumstantial evidence of
13 a call to violence now or in the future which
14 is both sufficiently strong and sufficiently
15 pervasive to lend color to the otherwise ambigu-
16 uous theoretical material regarding Communist
17 Party teaching, and to justify the inference
18 that such a call to violence may fairly be im-
19 puted to the Party as a whole, and not merely
20 to some narrow segment of it.

21 'But it should also be said that this element
22 of the membership crime, like the others, must
23 be judged strictissimi juris, for otherwise,
24 there is a danger that one in sympathy with the
25 legitimate aims of such an organization, but
26 not specifically intending to accomplish them

1 by resort to violence might be punished for
2 his adherence to lawful and constitutionally
3 protected purposes, because of other and un-
4 protected purposes which he does not necessar-
5 ily share.'

6 The Supreme Court has stated that it is difficult to
7 attribute a party line to a political organization.
8 In *Schneiderman v. United States*, 320 U.S. 118 at 184,
9 63 S. Ct. 1333 at 1351, 87 L. Ed. 1796, the Court said:

10 'Political writings are often over-exaggerated
11 polemics bearing the imprint of the period and
12 the place in which written. * * * Every utterance
13 of party leaders is not taken as party gospel.
14 And we would deny our experience as men if we
15 did not recognize that official party programs
16 are unfortunately often opportunistic devices
17 as much honored in the breach as in the obser-
18 vance.'

19 (3) Accordingly, we find no substantial evidence in
20 the record that the Socialist Workers Party advocates
21 or teaches by its 'Declaration of Principles and Con-
22 stitution' the violent or forceful overthrow of the
23 Government of the United States within the meaning
24 of the test laid down by *Scales* and *Noto*. Further-
25 more, there is no substantial evidence showing that
26 there is a party line within the organization which

1 advocates or teaches such overthrow."

2 The petitioner testified in this case that he was
3 not a member of the Socialist Workers' Party or the Young
4 Socialist Alliance or was he ever a member of the Communist
5 Party.

6 The District Court relied heavily as authority
7 for the denial of petitioner's application for citizenship
8 on the case of Berenyi vs. Immigration Service, 17 L. Ed. 2d
9 656 - US - 87 S.Ct. - January 23, 1967. The case is not
10 authority for the proposition relief upon. We quote from
11 the opinion:

12 "During the preparation of his application to
13 file a petition for naturalization, the petitioner was
14 asked the following question: 'Have you ever in the
15 United States or in any other place, (a) been a member
16 of, or in any way connected with or associated with
17 the Communist Party either directly, or indirectly
18 through another organization, group or person?' The
19 petitioner, under oath, answered 'No.' On two sub-
20 sequent occasions during the preliminary proceedings
21 on his petition for naturalization, the petitioner
22 again swore that he had never been a member of the
23 Communist Party.

24 At the final hearing before the District Judge,
25 the Government produced two witnesses whose testimony
26 indicated that the petitioner had been a member of

1 the Communist Party in Hungary. Dr. Pal Halasz
2 stated that he had known the petitioner when they
3 were both students at the University of Budapest Medical
4 School and had seen the petitioner attend Communist
5 Party meetings there on one or more occasions.
6 While such meetings were sometimes open to per-
7 sons who were not Party members, and Dr. Halasz was
8 not sure that the petitioner was a Party member, his
9 attendance at Party meetings gave Mr. Halasz the
10 impression that the petitioner was a member. Dr.
11 Gyorgy Kury related that he had attended a study
12 group at the University in September, 1948. These
13 groups met to discuss Marxist - Leninist ideology,
14 and students were required to attend regardless of
15 Party membership. One student in each group was
16 responsible for leading the discussion. Dr. Kury tes-
17 tified that at the meeting in question, the petitioner
18 introduced himself as a member of the Communist Party
19 and the student leader responsible for the group's
20 ideological education. Dr. Kury further testified
21 that the petitioner had told the group that he had
22 become a member of the Communist Party after Soviet
23 troops had occupied Hungary in 1945.

24 The petitioner testified that he had never been a
25 Party member or the ideological leader of any student
26 discussion group. He related the heavy pressures on

1 students at the University to attend Party functions
2 and become members, and admitted that these pressures
3 had led him to attend some open Party meetings as a
4 nonmember, but added that he had not been an active
5 participant at these meetings. The petitioner also
6 emphasized his religious upbringing and other factors
7 in his personal life which, he contended, made it un-
8 likely that he would become a Party member. The peti-
9 tioner's wife testified that he had never been a Party
10 member, and four other witnesses stated that while in
11 Hungary and after his arrival in the United States,
12 the petitioner had expressed his strong opposition
13 to the Communist Party and the Communist Regime
14 in Hungary.

15 Basing his decision solely on his own evaluation
16 of the testimony adduced at this hearing, the District
17 Judge concluded that the petitioner had become a Party
18 member in 1945 and had remained a member for an indef-
19 inite number of years, that the petitioner had attend-
20 ed study groups in Communist ideology. Accordingly
21 the court concluded that the petitioner had testified
22 falsely in the preliminary naturalization proceedings,
23 and denied his application for citizenship on the
24 ground that he was, therefore, 'not a person of good
25 moral character within the meaning of the Immigration
26 and Nationality Act.'⁸

1 The petitioner points out that in deportation cases
2 this Court has held that an alien may not be expelled
3 from this country on the ground that he has been a mem-
4 ber of the Communist Party unless his participation in
5 the Party amounted to 'meaningful association.' Rowoldt
6 v. Perfetto, 355 US 115, 2 L. Ed 2d 140, 78 S. Ct. 180;
7 Gastelum-Quinones v. Kennedy, 374 US 463, 10 L. Ed. 2d
8 1013, 83 S. Ct. 1819. He contends that the same rule
9 should apply in the context of naturalization, and
10 that the Government's proof in this case failed to
11 establish 'meaningful association.' But the petition-
12 er's application was not denied because of his Com-
13 munist Party membership. It was denied because, under
14 oath, he did not tell the truth. (Emphasis added.)

15 We cannot say that the District Court was wrong
16 in finding that the petitioner had failed to tell the
17 truth. It follows that the Court of Appeals was not
18 in error in declining to upset that finding.

19 Affirmed."

20 In Berényi, supra, it is readily discerned that
21 petitioner's denial of citizenship was not predicated upon
22 his meaningful membership in a subversive organization or
23 the Communist Party, but that he had sworn falsely before
24 the Naturalization Examiner and before the District Court,
25 which branded him a person lacking in good moral character
26 within the meaning of the Immigration and Nationality Act;

1 that such is not the issue here, nor urged by the Government.
2 It is well to note that in Berenyi, supra, the trial Court
3 found the evidence too weak to establish that the peti-
4 tioner's application should be denied because he had been
5 a member of the Communist Party. The footnote in Berenyi,
6 supra, recites the following:

7 "8. At the same time, the judge found the
8 evidence too weak to establish the Government's al-
9 ternative contentions that the petitioner's applica-
10 tion should be denied because he had been a Party
11 member within 10 years preceding the application for
12 citizenship in 1962, and thus came within §313 of
13 the Act, 66 Stat.240, 8 USC §1424, which provides
14 in relevant part:

15 '(a) . . . no person shall hereafter be natural-
16 ized as a citizen of the United States —

17

18 '(2) who is a member of or affiliated
19 with (d) the Communist or other totalitarian party
20 . . . of any foreign state

21

22 '(c) The provisions of this section shall
23 be applicable to any applicant for naturalization
24 who at any time within a period of ten years
25 immediately preceding the filing of the petition for
26 naturalization or after such filing and before taking

1 the final oath of citizenship is, or has been found
2 to be within any of the classes enumerated within
3 this section, notwithstanding that at the time
4 the petition is filed he may not be included within
5 such classes.'"

6
7 PETITIONER WAS DENIED A FAIR HEARING BY THE
8 NATURALIZATION EXAMINER IN THE PARTICIPATION OF THE
9 NATURALIZATION EXAMINER IN THE PROCEEDINGS BEFORE THE
10 LOWER COURT

11 The Naturalization Examiner prepared his findings,
12 conclusions and recommendations, he prosecuted the case be-
13 fore the United States District Court in opposition to peti-
14 tioner's application for citizenship, he also testified as
15 a witness. His credibility as a witness became an issue,
16 his opinions as to petitioner's eligibility, qualifications
17 for citizenship became an issue; he argued on behalf of the
18 Government; he filed opposing briefs on behalf of the Immi-
19 gration Service. In his capacity as Naturalization Exam-
20 iner he conducted the investigation. His activities en-
21 tailed that of conducting the investigation of petitioner's
22 qualifications, history, background and eligibility; examin-
23 ed the deportation proceedings; sought the introduction of
24 the Immigration Deportation proceedings over objections;
25 testified at the proceedings and cross examined the witnesses
26 offered on behalf of the petitioner.

1 Acting in the capacity of the Naturalization
2 Examiner he appeared as an investigator, Hearing Officer,
3 Prosecutor and Recommending Judge. Although the learned
4 District Court Judge in his written opinion recited that "the
5 Court has arrived at its judgment independently of any find-
6 ings or recommendations of the Naturalization Examiner," it
7 is naïve to suggest that the Court's decision was not influ-
8 enced by the examiner's investigation, hearings, findings,
9 conclusions and recommendations which were all a part of the
10 proceedings and the examiner's active and aggressive partici-
11 pation in the hearings conducted before the District Court.
12 The opinions of the Naturalization Examiner acting as a
13 trial attorney for the Immigration Service were well known to
14 the Court.

15 Thus petitioner was denied a fair hearing before
16 the Naturalization Examiner in light of the entire record.
17 It was compounded in proceedings before the United States
18 District Court where the same Examiner appeared as trial
19 attorney on behalf of the government and further exemplified
20 when he appeared as a witness and testified. We look
21 askance at such proceedings. This procedure denied peti-
22 tioner due process of law for no man, no matter how well
23 intentioned, can act in the dual capacity of an investigator,
24 prosecutor, Judge and juror and accord the accused a fair
25 hearing before the Immigration Service.

26 This Naturalization Examiner was biased and

1 prejudiced against the petitioner. Prior to arriving at a
2 decision in the case he had read and examined the entire
3 Immigration file:

4 1. The decision of the Special Inquiry Officer (RT 84);

5 2. The decision of the Board of Immigration Appeals
6 (RT 84);

7 3. The decision of the Ninth Circuit (RT 85);

8 and when interrogated before the District Court stated he
9 was acquainted with the record but had reached "no opinion
10 with respect to whether, at that time, this person was pre-
11 cluded from naturalization.) (RT 84, 85, 103). This bor-
12 ders on the ridiculous.

13 The record discloses the directive of the District
14 Director of Immigration, George K. Rosenberg that petitioner
15 be processed for deportation without according him the priv-
16 ilege of processing his application for citizenship (RT-97).
17 Although the Naturalization Examiner denied knowledge of this
18 directive in the file, Mr. George Rosenberg, the District
19 Director, present at the court hearing, stipulated that such
20 directive was in the file (RT 98).

21 Of particular importance is the fact that the
22 Naturalization Examiner discussed the case with Mr. Rosen-
23 berg upon remand from the Circuit to the Immigration Depart-
24 ment by order of the Supreme Court, to process the petition-
25 er's application for naturalization and what position the
26 Immigration Department "would take with respect to the

1 effect of Section 318". (RT 78-79)

2 Indeed this is a most aggravating case, as we
3 have before noted. It does not comport with the concept of
4 American standards of fair play and equal justice. The
5 Naturalization Examiner and the lower Court resorted to a
6 patently erroneous view of the law. To judge the state of
7 mind of the petitioner by the credibility of what he says
8 and the reflection of his inner views by his outward conduct
9 calls for the highest skill and the most careful judgment
10 in making deductions and drawing conclusions to comply with
11 the standards required to become a citizen under the provi-
12 sions of Title I, USCA, Section 1427.

13 Attachment to the principles of the Constitution
14 require as condition for naturalization of an alien accept-
15 ance of fundamental political habits and attitudes which
16 prevail in the United States and willingness to obey the
17 laws which may result from them. It does not mean that one
18 stifle his thoughts, strangle his feelings or shout his
19 allegiance to please the examiner or curry his favor. There
20 was no repudiation of democratic principles, democracy and
21 liberty required by the Constitution to bar petitioner as a
22 citizen of the United States. There was no evidentiary
23 development indicating that petitioner believed in anything
24 of evil design against the Government, although he may have
25 had foolish beliefs, and though interrogated at length in
26 what we would call a "field day" by the Naturalization

1 Examiner, no abstract political theories developed that
2 displayed petitioner's animosity toward or his participation
3 in any conduct that was inimical to the good order and
4 happiness of the United States.

5 Petitioner was seeking knowledge, was attending a
6 State Junior College; his participation in a "Fair Play"
7 organization was not to be decried but to be encouraged.
8 To say the least, the scales of justice and fair play should
9 be balanced in his favor, not to belittle and besmirch his
10 integrity and character by branding him as disloyal to the
11 United States and of immoral character and not sympathetic
12 to the good order and happiness of the United States.

13 His repudiation of the principles of Castro upon
14 learning of his Communistic inclinations were true answers
15 to questions propounded by the Naturalization Examiner and
16 his change of opinion concerning Castro upon learning of his
17 true ideology speaks more for his character and convictions
18 than if he had groveled in contrition and penitence.

19 So we say there was no secret concealment or in-
20 tent to harbor evil designs against the peace, dignity,
21 happiness and well being of the United States. He is being
22 barred from citizenship on purely abstract reasoning while
23 his true ideology produced in his hearing before the District
24 Court goes unheeded.

25 Since the year 1963, the year of petitioner's
26 honorable discharge from the United States Army Reserves,

1 the petitioner has suffered the pangs of belittlement and
2 continued frustration, the accusations of disloyalty and,
3 like the "sword of Damocles hanging over his head" the
4 ever present, constant fear of deportation from the country
5 he has honorably served. The test of his loyalty which the
6 Naturalization Examiner doubted is best exemplified by his
7 proven willingness to give his life for this country. The
8 psuedo super prosecution Examiner has doubted his loyalty
9 and willingness to uphold the Constitution of the United
10 States. If this were true some blemish would have been
11 evident in some manner during the eight years of his service
12 to the Government. The Examiner's doubts are sham and his
13 reasons frivolous. Throughout petitioner's experience
14 with the Immigration Service he has been met with nothing
15 but open hostility and a display of bias and prejudice.
16 Witness, upon his discharge he filed his application for
17 citizenship, given to him as a reward for his military ser-
18 vice, the District Director of Immigration in his inter-of-
19 fice communication addressed to the Naturalization Department
20 expressed his intention that he would not exercise his dis-
21 cretion to permit the permit the processing of the applica-
22 tion, and instructed the officers of the Service to initiate
23 deportation proceedings, which was accordingly done. The
24 petitioner was then prosecuted for deportation by a trial
25 attorney before a Special Inquiry Officer, though petitioner
26 was not represented by counsel. During the proceedings he

1 was never advised of his right to apply for suspension of
2 deportation. He was denied the right to voluntary departure
3 from the United States and any discretionary relief - not
4 informed of his right to apply for citizenship nor fully ad-
5 vised of his statutory and constitutional rights - but order-
6 ed deported after rather perfunctory hearing.

7 Upon appeal to the Board of Immigration Appeals
8 the Order of Deportation was affirmed and appeal dismissed.
9 This Circuit on judicial review affirmed. It was through the
10 grace of the decision of the Supreme Court that he was
11 permitted to process his application for citizenship and
12 that no deportation proceedings were to be had.

13 It is to be noted with emphasis that the District
14 Director's inter-office communication was directed to the
15 same Naturalization Examiner who subsequently conducted the
16 Naturalization proceedings on remand. After discussion
17 with the District Director this same examiner prepared his
18 findings and conclusions recommending against naturalization.
19 This same examiner appeared on behalf of the Government at
20 the hearing before the United States District Court in
21 opposition to the granting of citizenship and vehemently
22 cross-examined petitioner and his witnesses opposed the
23 granting of the petition and during these proceedings openly
24 displayed his bias and animosity, as well as that of the
25 Service, particularly and with emphasis during during the
26 giving of the testimony and opinion concerning the

1 petitioner's loyalty to the United States, his willingness
2 to uphold the Constitution and his opposition toward the
3 good order and happiness of the United States, forgetting and
4 completely casting aside the fact that the petitioner had
5 taken the oath to uphold the Constitution when he entered
6 the Service of the Armed Forces, and served, without a blem-
7 ish on his record, for a period of eight years. One must
8 look with skepticism and dismay at such continued display of
9 hostility and bias, to say nothing of lack of fairness. Is
10 this the reward that the Government of the United States be-
11 stows upon its alien veterans?

12 THE DECISION BELOW

13 THE DECISION OF THE LOWER COURT WAS CLEARLY ERRONEOUS

14 At the very outset of the hearing before the Dis-
15 trict Court, over objection of petitioner's counsel, the
16 Court admitted into evidence the entire deportation pro-
17 ceedings (RT-8).

18 During the hearing before the District Court a
19 colloquy took place between Court and Counsel concerning
20 the interpretation of the Supreme Court's opinion and di-
21 rective. The Service took the position before the District
22 Court that there was an outstanding finding of deportability
23 existing against the petitioner (RT-80).

24 The Court made the following observation:

25 "THE COURT: Is it your position, Mr. Marcus,
26 that the Supreme Court ordered that there be no

1 be no deportation proceedings?

2 MR. MARCUS: Yes, your Honor.

3 THE COURT: That is not my interpretation of
4 the Supreme Court decision.

5 The Supreme Court ordered that the judgment of
6 the Ninth Circuit was to be vacated and the case be
7 remanded to the Court of Appeals. And it says the
8 reason we are making this order, the order was confined
9 solely to the judgment being vacated and the case
10 remanded, was because the Attorney General -- I mean
11 the Solicitor General represented that there would
12 be no deportation proceedings until such determina-
13 tion.

14 Now, these are representations of the Solici-
15 tor General. And it is the order of the Supreme
16 Court, 'That there will be no deportation proceed-
17 ings.'

18 MR. MARCUS: Well, I will accept --

19 MR. ROSENBERG: May I respectfully state
20 that your Honor's position is completely in accord
21 with the subsequent order of the Court of Appeals.
22 They obviously then could not provide a reinstating
23 order if the proceedings had been terminated.

24 That decision said that if this petitioner
25 failed to comply with the order of the Court of
26 Appeals previously entered, it shall be reinstated,

1 and obviously you can't reinstate something that
2 has been terminated."

3 The error of the Trial Court and the position of
4 the Service is evident for Section 1429 of the Immigration
5 and Nationality Act provides that:

6 " * * *Notwithstanding the provisions of section
7 405(b) of this Act, and except as provided in sec-
8 tions 1438 and 1439 of the title no person shall be
9 naturalized against whom there is outstanding a final
10 finding of deportability pursuant to a warrant of
11 arrest issued under the provisions of this chapter
12 or any other Act; and no petition for naturalization
13 shall be finally heard by a naturalization court if
14 there is pending against the petitioner a deportation
15 proceeding pursuant to a warrant of arrest issued un-
16 der the provisions of this chapter or any other Act;
17 Provided, That the findings of the Attorney General
18 in terminating deportation proceedings or in suspend-
19 ing the deportation of an alien pursuant to the pro-
20 visions of this chapter, shall not be deemed binding
21 in any way upon the naturalization court with respect
22 to the question of whether such person has established
23 his eligibility for naturalization as required by
24 this subchapter. June 27, 1952, c. 477 Title III,
25 ch. 2 § 318, 66 Stat.244."

26 This explains quite clearly the reason for and the

1 wording of the directive from the Supreme Court, for if
2 there be an outstanding finding of deportability, the peti-
3 tioner was ineligible for naturalization and the Naturaliza-
4 tion Court was without statutory jurisdiction to naturalize
5 if there "is pending against the petitioner a deportation
6 proceeding." (Title VIII, USCA, Section 1429) The Court,
7 however, proceeded upon the basis that there was a finding
8 of deportability and an Order for Deportation, irrespective
9 of the Mandate and the statutory provision to the contrary.

10 The opinion of the District Court denying the
11 petition for Naturalization quotes extensively from peti-
12 tioner's deportation proceedings. Petitioner's counsel
13 raised objections to the introduction of this evidence and
14 proceedings, which the Court overruled. In justifying its
15 receipt in evidence the Court observed: "The objection
16 is fully answered by the Ninth Circuit in the deportation
17 proceedings and need not be discussed further here."

18 (Millan-Garcia v. Immigration and Naturalization, 343 F. 2d
19 825 (9th Cir. 1965). The Court overlooked the fact that the
20 Supreme Court of the United States vacated the decision of
21 the Ninth Circuit(382 US 69). The opinion of the Circuit
22 was not effective at the hearing nor the "law of the case"
23 or "stare decisis". In support of the trial court's deci-
24 sion he quoted the petitioner's testimony exhaustively from
25 the deportation proceedings and the petitioner's testimony
26 during the hearing conducted before him on March 14, 1966.

1 An examination of the witness' testimony given at this
2 hearing will clearly demonstrate that no evidence was
3 developed that would exclude him from becoming a citizen
4 of the United States. His membership in "Fair Play for
5 Cuba" for a short period of time gave no indication that he
6 was opposed to the principles of the Government of the
7 United States. The petitioner very succinctly explained
8 that he was "taken in" at the inception of Castro's ascend-
9 ancy and in the years 1961 and 1962 with certain principles
10 advocated by him. When he became acquainted with the
11 situation, the ultimate objectives and purposes of the
12 Castro regime he had no further association with them. It
13 can be stated without fear of contradiction that many inno-
14 cent Americans were taken in by the Castro Regime, even our
15 own Government was initially sympathetic to his cause.
16 Disillusionment came to those who sympathized with his ob-
17 jectives when it became apparent what those ultimate objec-
18 tives really were. There is not one iota of evidence in
19 this record that indicates that the petitioner advocated
20 the overthrow of the Government of the United States by
21 force or violence. The mere abstract teaching of Communist
22 theory including the teaching of the moral propriety or
23 even moral necessity for a resort to force and violence is
24 not the same as preparing a group for violent action and
25 steeling it to such action. There is not one scintilla
26 of evidence in this record, direct or circumstantial of any

1 call to violence or violent overthrow of the Government.
2 To bar discussion of the legitimate aims of such an organ-
3 ization, but not specifically intending to accomplish them
4 by resort to violence would be a curtailment of the consti-
5 tutional right of freedom of speech. Not one question was
6 directed by the Naturalization Examiner to elicit from the
7 petitioner what principles of the Communist Party he, the
8 petitioner, had advocated or believed in. It is without
9 conflict and admitted that petitioner was never a member of
10 the Party. Many Universities today have courses in the
11 teachings of Communism. This does not indicate that the
12 teachers or the University advocate or believe in the prin-
13 ciples of the Communist Party. There is no evidence in this
14 record that the membership by the petitioner in Fair Play
15 For Cuba in any way would render him ineligible to citizen-
16 ship for no word of evidence established the aims and pur-
17 poses of this organization. The title "Fair Play for Cuba"
18 should give some suggestion of its true character and pur-
19 pose. Certainly this record is devoid of any evidence that
20 it advocated any principles that were not compatible with
21 the good order and happiness of the United States. In
22 hearings before the District Court the petitioner testified
23 that he would participate in an attack on Cuba because he
24 had since the deportation proceedings learned that the Re-
25 gime of Cuba was Communistic, whose aims were the same as
26 the Soviet Union (RT 158). He further explained his testi-

1 , for which he honorably served for a period of eight
2 years.

3 DATED: January 5, 1968.

4 Respectfully submitted.

5
6 *David C. Marcus*

7 DAVID C. MARCUS
8 Attorney for Appellant
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26

CERTIFICATION OF COUNSEL

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SS

DAVID C. MARCUS, being first duly sworn, deposes and says:

That I am the attorney for the appellant, ANTONIO HECTOR MILLAN-GARCIA, and I do hereby certify that I have examined the provisions of Rules 18 and 19 of the above entitled Court, and that in my opinion the tendered Appellant's Opening Brief, tendered herewith on behalf of the said ANTONIO HECTOR MILLAN-GARCIA conforms to all requirements.

DAVID C. MARCUS

Subscribed and sworn to
before me this 8th day
of January, 1968.

Melvin S. Hand
Notary Public in and for
said State.

(SEAL)

My commission expires
August 13, 1971.

1 STATE OF CALIFORNIA

2 COUNTY OF LOS ANGELES

(PROOF OF SERVICE BY MAIL
ss - 1913a and 2015.5 CCP)

3 I am a citizen of the United States and a resident of
4 the county aforesaid, I am over the age of 18 years and not a
5 party to the within entitled action; my business address is
6 215 West Fifth Street, Los Angeles, 90013 California. On
7 Monday, January 8, 1968, I served the within Appellants Open-
8 ing Brief on the Appellee in said action, by placing a true
9 copy thereof enclosed in a sealed envelope with postage there-
10 on fully prepaid in the United States mail at 215 West Fifth
11 Street, Los Angeles, California addressed as follows:

12 Immigration & Naturalization Service
13 300 North Los Angeles Street,
Los Angeles, California

14 Solicitor General of
15 the United States,
Washington, D. C.

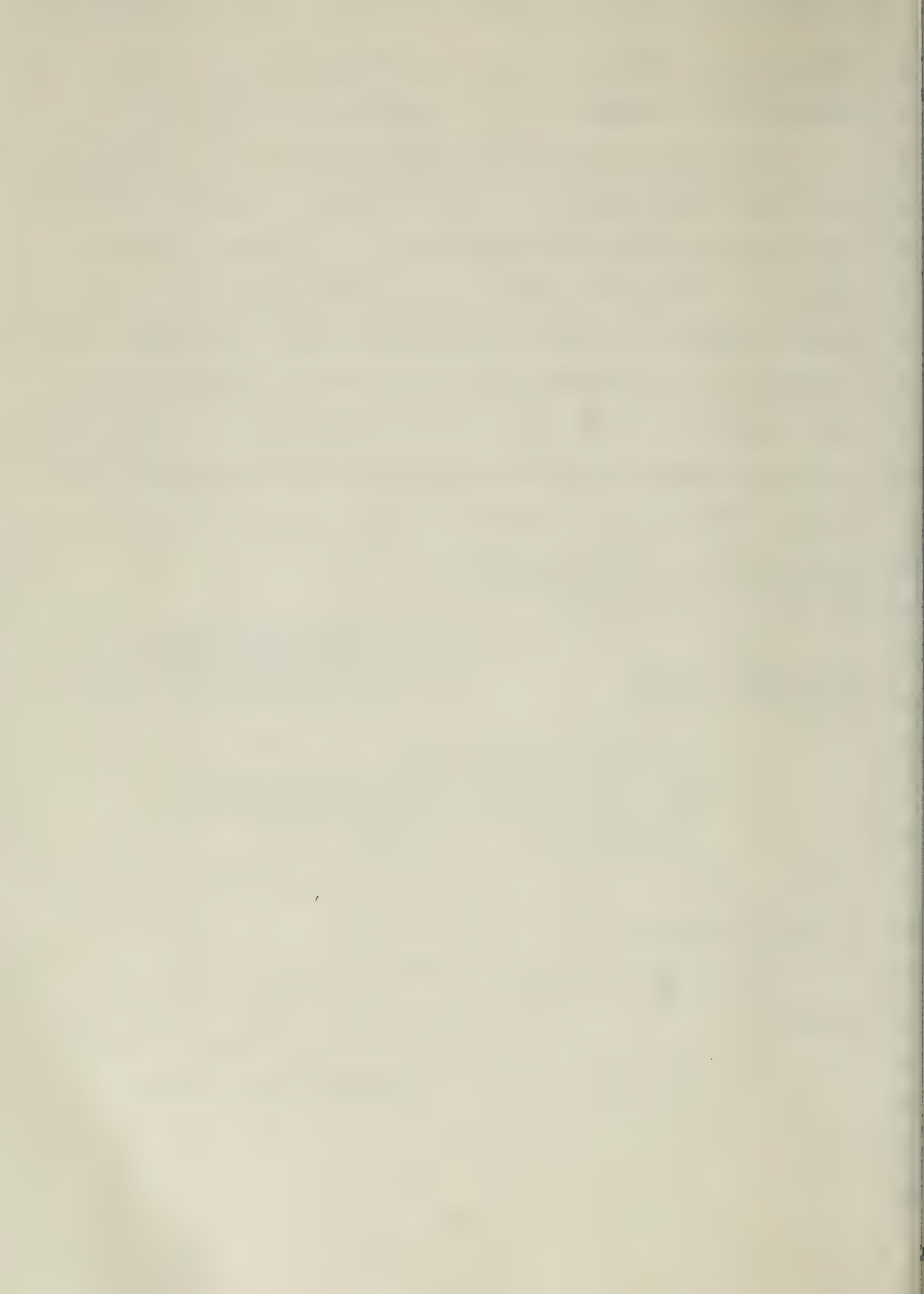
United States Attorney
U.S. Postoffice & Courthouse
Los Angeles, California 90012

16 Clerk of the U.S. Court of Appeals
17 For the Ninth Circuit
18 U.S. Postoffice & Courthouse Building
San Francisco, California, 94101
(Original and 10 copies)

19 I certify under penalty of perjury that the foregoing
20 is true and correct.

21 Executed on January 8, 1968 at Los Angeles, Cali-
22 fornia.

23 *Patricia Allyn Shannon*
24 PATRICIA ALLYN SHANNON
25
26



N O. 2 2 0 2 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO HECTOR MILLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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FREDERICK M. BROSIO, JR.,
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FILED

MAR 11 1968

Attorneys for Appellee,
United States of America.

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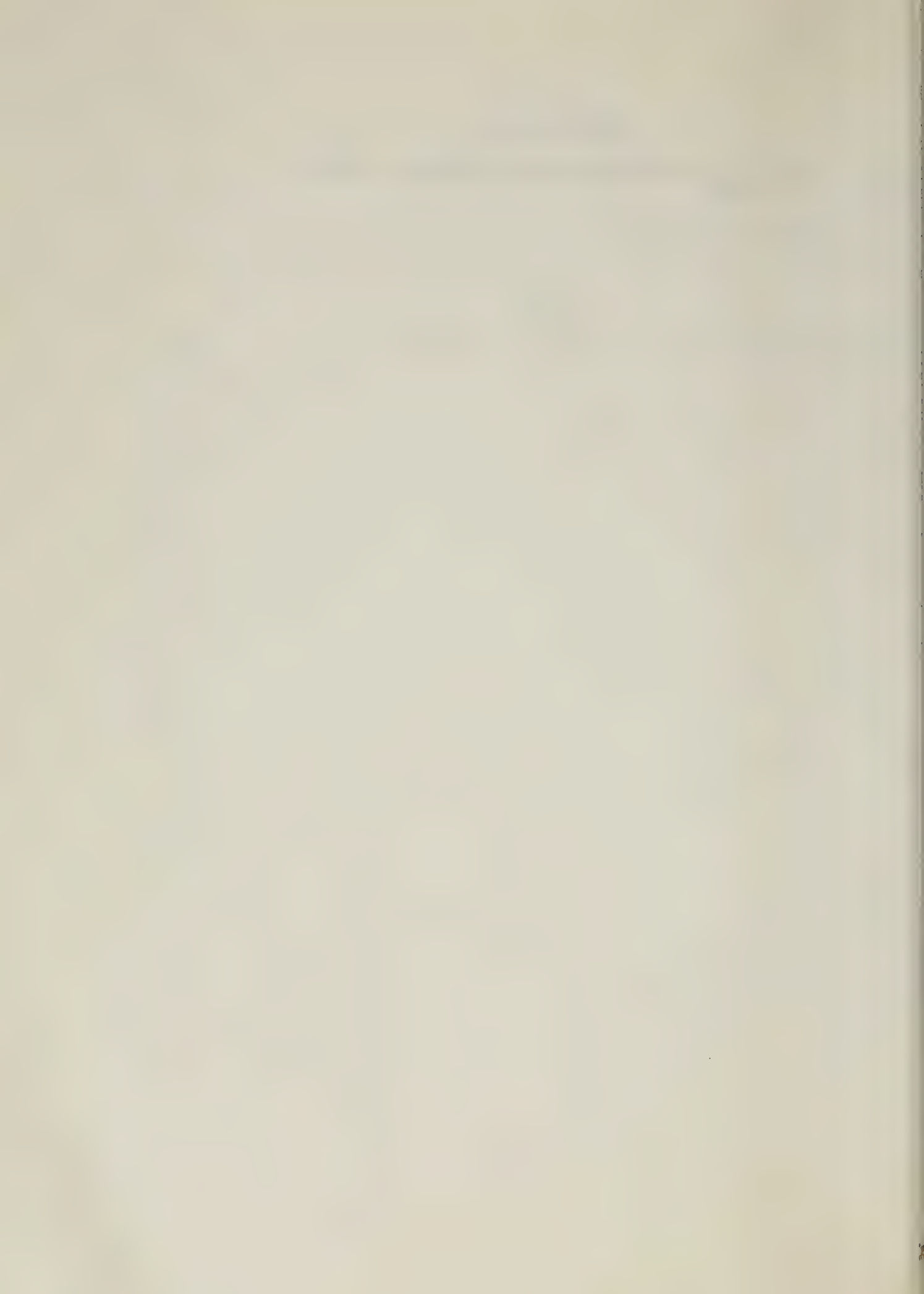


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N O. 2 2 0 2 5

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO HECTOR MILLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

JURISDICTION

On January 31, 1966 appellant, Antonio Hector Millan ^{1/} filed a petition for naturalization in the United States District Court for the Central District of California. Section 310(a) of the Immigration and Nationality Act, 8 U.S.C. §1421, confers upon the district courts of the United States jurisdiction to naturalize persons as citizens of the United States. Appellee believes that the court below had jurisdiction to naturalize appellant notwithstanding

^{1/} The petition for naturalization was filed under the name Antonio Hector Millan, although appellant's deportation proceedings were conducted under the name Antonio Hector Millan-Garcia.



the provisions of Section 318 of the Immigration and Nationality Act; however, because there is some question in this regard, the problem will be more fully developed under Part I of Argument, infra.

On April 13, 1967 the District Court entered an order denying appellant's petition for naturalization [C. T. 11; see also, Petition of Millan, 266 F. Supp. 545 (C. D. Calif. 1967)]; 2/ and since that order was a final decision, this Court has jurisdiction of the present appeal pursuant to 28 U. S. C. § 1291.

2/ By order filed herein on February 1, 1968 this Court ruled that:

"The record on appeal in this case shall be limited to the following: (1) matter which was part of the record before the district court in proceedings following remand by the Supreme Court; and (2) matter which was part of the record upon the first appeal in this court, No. 19,351. . . ."

The pages of the record of appellant's deportation proceedings which was filed in No. 19,351 will be indicated herein by "R". In No. 19,351 this Court ordered the record augmented by certain documents, which were attached as Exhibits "A", "B", "C", "D", and "E" to Opposition To Petitioner's Motion To Augment Record. The latter documents will be referred to herein as supplemental exhibits, e. g. Supplemental Exhibit "A", Supplemental Exhibit "B", etc.

The record before the district court in proceedings following remand consisted of (1) the Clerk's Transcript of Record, the pages of which will be indicated herein by "C. T. "; (2) the Reporter's Transcript of Proceedings, the pages of which will be indicated herein by "R. T. "; and (3) exhibits received in evidence by the district court, which will sometimes be abbreviated herein as "Ex. ".

References to appellant's Opening Brief will be indicated "Br. ".

STATEMENT OF THE CASE

On August 9, 1963 the Immigration and Naturalization Service received appellant's Application to File Petition for Naturalization, Form N-400, dated August 1, 1963 [Supplemental Exhibit "A"]. On August 22, 1963, certification of appellant's military or naval service was requested; and said certification, executed by the Department of the Army on October 18, 1963, was received by the Immigration and Naturalization Service on October 24, 1963 [Supplemental Exhibit "B"; see also Ex. 2].

On January 23, 1964, the District Director of the Immigration and Naturalization Service at Los Angeles, California, determined not to withhold the institution of deportation proceedings to allow appellant to petition for naturalization [Supplemental Exhibit "E"]; and on March 17, 1964, deportation proceedings were instituted against appellant, charging that he was subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act, in that at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, an immigrant not in possession of a valid immigration visa [R. 77].

After a deportation hearing [R. 12, et seq.; see also Ex. 3] the presiding special inquiry officer on April 3, 1964, ordered appellant deported from the United States to Mexico on the ground charged [R. 5-10, 75]. The deportation order was affirmed by the Board of Immigration Appeals on June 17, 1964 [R. 2-4].

On June 17, 1964, appellant filed in this Court a Petition for Review, challenging his deportability and the order of deportation outstanding against him; and on April 5, 1965, this Court rendered its decision affirming the deportation order [See Millan-Garcia v. INS, No. 19,351, 343 F.2d 825 (9th Cir. 1965)].

Thereafter, appellant filed a Petition for Writ of Certiorari in the Supreme Court of the United States, seeking to review the decision of this Court. The Solicitor General of the United States filed a memorandum in response to the petition which, among other things, pointed out the apparent inconsistency between Sections 318 and 329 of the Immigration and Nationality Act, and suggested that the petition for a writ of certiorari be held on the docket pending final disposition of the naturalization proceeding instituted by appellant [Ex. C, pp. 6, 9]. On November 8, 1965, the Supreme Court rendered the following decision [See Ex. A; see also 382 U.S. 69]:

"The motion for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Appeals upon examination of the entire record and in light of the representations of the Solicitor General that the petitioner will be afforded an opportunity to apply for citizenship and that there will be no deportation proceedings until such determination."



Subsequently on January 11, 1966, this Court made an order pursuant to the decision of the Supreme Court providing, inter alia, that appellant be afforded an opportunity to file a petition for naturalization within a specified time, and further providing that if the naturalization petition was filed within the time allowed, the proceedings in No. 19,351 "shall be held in abeyance until said petition for naturalization is finally determined" [see Ex. 8].

Appellant timely filed his Petition for Naturalization in the District Court on January 31, 1966. ^{3/} Appellant was thereafter examined by Designated Examiner Brian H. Simpson [see Ex. 1]; and the designated examiner subsequently recommended that appellant's Petition for Naturalization be denied on the ground that he had failed to establish that he is attached to the principles of the Constitution of the United States and favorably disposed to the good order and happiness of the United States, and on the further ground that appellant had failed to establish that he can take the oath of allegiance to the United States without mental reservation [see Exhibit 5, page 12].

Hearings on appellant's Petition for Naturalization were held before the District Court on March 20, 1967 and March 22, 1967; and on April 6, 1967 the lower court filed its Order Regarding the

^{3/} Apparently appellant's Petition for Naturalization was not made a part of the record in this Court; although his Application to File Petition for Naturalization dated January 31, 1966, is before this Court as Ex. 4. Appellee does not consider appellant's Petition for Naturalization as essential to a decision in this case; however, this Court may wish to direct the Clerk of the District Court to transmit to it a copy of appellant's original Petition for Naturalization so that the record on this appeal may be complete.



Admission of Evidence and Certain Matters Taken Under Submission [C. T. 9]. Thereafter on April 13, 1967 the District Court filed and entered its Order Denying Petition For Naturalization [C. T. 11; see also Petition of Millan, 266 F. Supp. 545 (C. D. Calif. 1967)]. Appellant filed a Notice of Appeal from said order of the District Court on May 2, 1967 [C. T. 26].

ISSUES PRESENTED

1. Did the District Court have jurisdiction to naturalize appellant in view of the provisions of Section 318 of the Immigration and Nationality Act?
2. Did the District Court err in denying appellant's petition for naturalization?
3. Was appellant denied a fair hearing?

STATUTES INVOLVED

The statutes involved in the issues in this case, or pertinent portions thereof, are quoted in the Appendix to this Brief.



ARGUMENT

I

APPELLEE BELIEVES THAT THE DISTRICT COURT HAD JURISDICTION TO NATURALIZE APPELLANT NOTWITHSTANDING THE PROVISIONS OF SECTION 318 OF THE IMMIGRATION AND NATIONALITY ACT.

As the Solicitor General of the United States pointed out [Exhibit C, page 6] the application of Section 318 of the Immigration and Nationality Act to bar appellant's naturalization would create an apparent inconsistency. The only ground for appellant's deportation is the fact that he entered the United States without a visa in violation of law. To allow deportation proceedings on this ground to bar appellant's naturalization would conflict with the intent of Congress, expressed in Section 329 of the Immigration and Nationality Act, to authorize an eligible veteran to become naturalized "whether or not he has been lawfully admitted to the United States for permanent residence".

The barring provisions of Section 318 of the Immigration and Nationality Act, and of its predecessor, Section 27 of the Subversive Activities Control Act of 1950 has been applied by the courts upon many occasions [Shomberg v. United States, 348 U.S. 540 (1955); Duenas v. United States, 330 F.2d 726 (9th Cir. 1964); Petition of Terzich, 256 F.2d 197 (3rd Cir. 1958), cert. denied 358 U.S. 843; Banks v. United States, 204 F.2d 583 (5th Cir. 1953); Jew Sing v. United States, 202 F.2d 715 (9th Cir. 1953); United States ex rel Jankowski v. Shaughnessy, 186 F.2d 580 (2nd Cir.



1951); Petition of Yow Leslie Chung, 199 F. Supp. 566 (E.D. N.Y. 1961); Petition of Santos, 169 F. Supp. 115 (S.D. N.Y. 1958); Petition of Horvath, 166 F. Supp. 938 (N.D. W. Va. 1958); In Re Muniz, 151 F. Supp. 173 (W.D. Penn. 1958); Application of Chin King, 124 F. Supp. 911 (S.D. N.Y. 1954)].

However, none of the cases cited above involved the applicability of Section 318 under the factual circumstances here presented. The petitioners in most of the above cases did not seek naturalization under Section 329 of the Immigration and Nationality Act; consequently the apparent inconsistency between Sections 318 and 329, which is the crux of the problem here presented, could not arise.

This Court in Duenas v. United States, supra, was confronted with an inconsistency between Sections 318 and 329 of the Immigration and Nationality Act under circumstances similar to those here present. However, the present case differs from Duenas in that the review of appellant's deportation proceedings is now pending before this Court, having been held in abeyance until appellant's petition for naturalization is finally determined. There was no deportation review pending when Duenas was decided. The same distinction can be drawn between the present case and Petition of Santos, supra.

It is now clear that a draftsman's error led to the present inconsistency between Sections 318 and 329 of the Immigration and Nationality Act; that Congress intended to except Sections 328 and 329 of the Act from the operation of Section 318, but through



inadvertence excepted Sections 327 and 328 instead.

Congress is currently in the process of correcting its error; and perhaps when this cause comes on for hearing the jurisdictional question will have been rendered moot. On March 4, 1968 the House of Representatives passed H. R. 15147 [Congressional Record March 4, 1968, page H-1582]. Section 2 of this Bill amends Section 318 of the Immigration and Nationality Act by striking out "sections 327 and 328" and substituting "sections 328 and 329". Section 4 of the Bill amends Section 329 of the Immigration and Nationality Act to allow an eligible veteran to be naturalized "notwithstanding the provisions of section 318 as they relate to deportability" [See Congressional Record, supra, page H-1574]. The purpose of the amendments was expressed as follows [See Congressional Record, supra, page H-1575]:

"Sections 2, 3 and 4 of this bill are technical amendments to the Immigration and Nationality Act. During the conference on the act in 1952, the words 'sections 327 and 328' were inadvertently incorporated into section 318 of the act instead of 'sections 328 and 329.' The purpose of these amendments is to correct this error."



II

THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S PETITION FOR NATURALIZATION.

A. Burden of Proof and Scope of Review.

An alien who seeks to become naturalized as a citizen of the United States has the burden of establishing his eligibility for such citizenship in every respect, and any doubts concerning admissibility must be resolved in favor of the government and against the alien [Berenyi v. Immigration Director, 385 U.S. 630, 636-637 (1966); United States v. Macintosh, 283 U.S. 605, 626 (1931); United States v. Schwimmer, 279 U.S. 644, 649-650 (1929); United States v. Manzi, 276 U.S. 463, 467 (1928)]. As the Supreme Court in Berenyi v. Immigration Director, supra, declared (pp. 636-637):

" . . . When the Government seeks to strip a person of citizenship already acquired, or deport a resident alien and send him from our shores, it carries the heavy burden of proving its case by 'clear, unequivocal, and convincing evidence.' But when an alien seeks to obtain the privileges and benefits of citizenship, the shoe is on the other foot. He is the moving party, affirmatively asking the Government to endow him with all the advantages of citizenship. Because that status, once granted,

cannot lightly be taken away, the Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship. For these reasons, it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect. This Court has often stated that doubts 'should be resolved in favor of the United States and against the claimant.' E. g., United States v. Macintosh, 283 U.S. 605, 626. . . ."

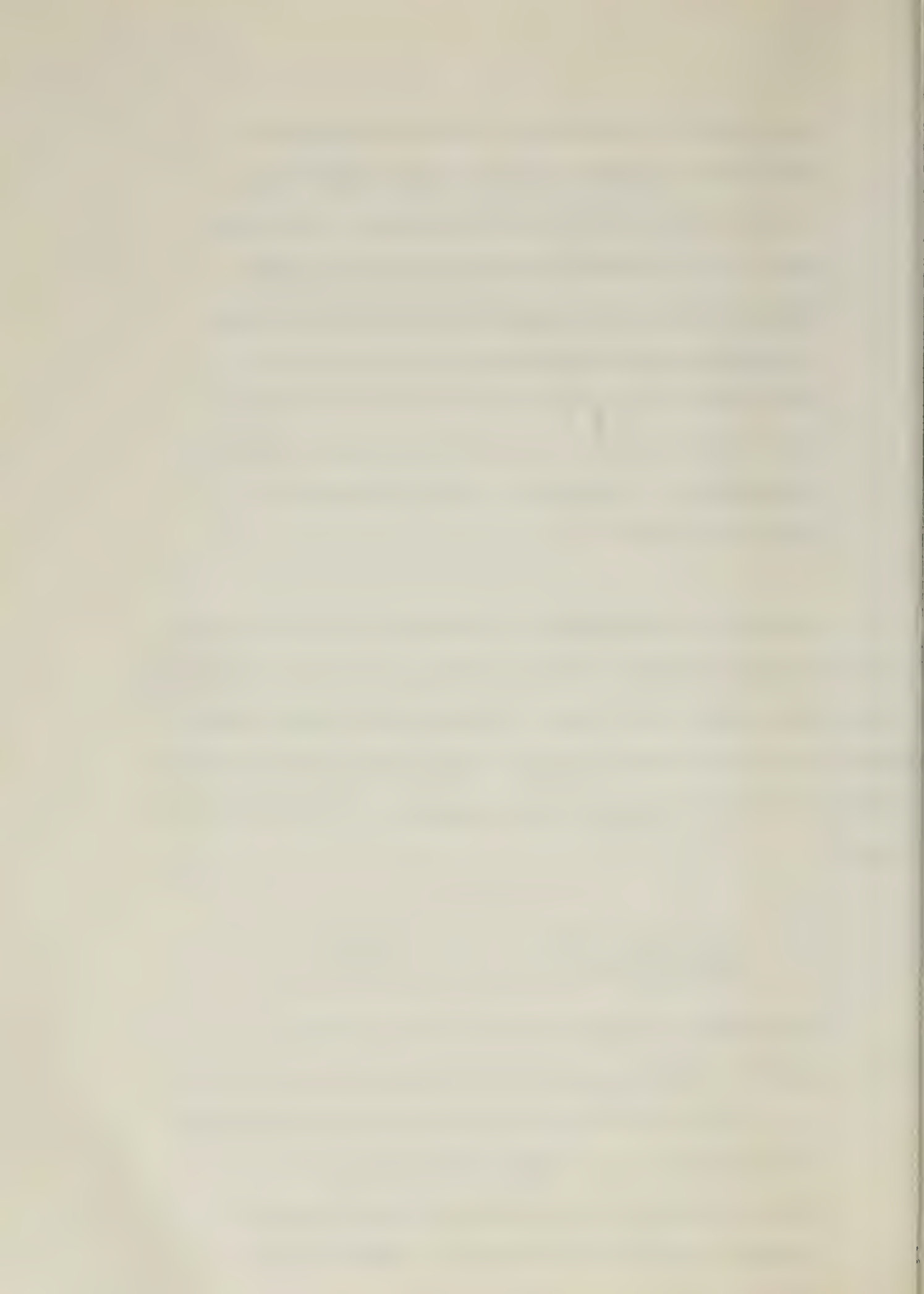
[Emphasis added]

Moreover, on an appeal from the denial of a petition for naturalization, the District Court's findings of fact will not be set aside unless shown to be clearly erroneous [Rule 52(a), Federal Rules of Civil Procedure; Taylor v. United States, 231 F.2d 856, 858 (5th Cir. 1956); Allan v. United States, 115 F.2d 804 (9th Cir. 1940)].

B. The Evidence Was Sufficient to Deny Naturalization.

In its Order Denying Petition For Naturalization, the court below said [C. T. 24-25; see also 266 F. Supp. at pp. 551-552]:

"8 U.S.C.A. § 1427(a) requires that a petitioner for naturalization must establish that during the five years preceding the filing of his petition he has been a person of good moral character, attached to the



principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

" . . . Within the five years from the date of his application to become a citizen the petitioner:

"1. Endeavored to obtain arms and equipment for the overthrow of a foreign government.

"2. Approved the confiscation of private property without due process or payment.

"3. Declared he would not bear arms in the event of armed conflict between the United States and any Spanish-speaking country.

"4. Was ambivalent in his loyalty to the United States.

"5. Stated that he believed in the principles of Communism.

"6. Stated that he taught the principles of Communism, although later retracted his testimony.

"7. Actively worked for the organization known as Fair Play For Cuba.

"The petitioner has not passed the tests for the requirement of naturalization.

"It is ordered that the petition for naturalization be denied. . . ."

The evidence amply supports each of the above quoted



findings itemized by the District Court, and these findings are legally sufficient to justify the denial of appellant's naturalization.

During the years 1961 and 1962 appellant seemed to be much more concerned with the revolutionary activities of Castro, Cuba and other Latin-American countries than he was with the principles of the American Constitution or with the good order and happiness of the United States. During 1961 appellant joined an organization known as Fair Play For Cuba, which organization was designed to support and disseminate information concerning Fidel Castro and the Cuban revolution. While in this organization appellant organized and attended meetings, printed and distributed pamphlets and participated in demonstrations which supported the Castro regime. At one of these meetings movies were shown of the abortive Bay Of Pigs invasion, which appellant was told were filmed by the Cuban Government. During 1961 and 1962 appellant also attended meetings of the July 26 Movement, an organization that worked with Fair Play For Cuba and had similar purposes [Exhibit 1, pages 17-26; Exhibit 3, pages 26-38].

During 1962 appellant's aid was enlisted in obtaining supplies, ammunition and arms to supply a rebel band of 100 men in Nicaragua for the purpose of conducting guerilla warfare in that country and eventually overthrowing the Government; and appellant sought means of getting equipment, arms, support, and money for this guerilla warfare but was unsuccessful [Exhibit 1, pages 34-35].

During his deportation hearing, appellant stated that when he was with Fair Play For Cuba he believed in the principles of

Communism and taught the principles of Communism, although he later retracted the latter statement [Exhibit 3, pages 26-29]. If appellant believed in the principles of Communism as practiced by the Communist Party of the United States, such beliefs would clearly bar his naturalization [See Communist Party v. Control Board, 367 U.S. 1 (1961)]. Even if appellant did not fully understand the aims and purposes of Communism, the nature of appellant's beliefs were nevertheless sufficiently doubtful to warrant a denial of naturalization.

Moreover, during his deportation hearing on April 3, 1964 appellant expressed an unwillingness to bear arms on behalf of the United States against Cuba or against any other Spanish-speaking country [R. 68-69; Exhibit 1, page 37]. This alone would be sufficient to justify the Court in concluding that appellant was not then attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States [Cf. In Re Krause's Petition, 159 F. Supp. 687 (S.D. Ala. 1958); In Re MacKay, 71 F. Supp. 397 (N.D. Ind. 1947); compare, Girouard v. United States, 328 U.S. 61 (1945)].

The rule in Girouard v. United States, supra, has no applicability to this case, since appellant did not claim to be a conscientious objector on religious grounds [See In Re MacKay, supra]; and Thompson v. Immigration and Naturalization Service, 332 F.2d 167, 169-170, cited by appellant [Br. 29] is distinguishable. In Thompson, the question concerning military service was so far fetched that petitioner's equivocal response had no real significance.



On the other hand, appellant's unwillingness during 1964 to bear arms against Cuba was extremely significant, particularly in the wake of the Cuban missile crisis.

Appellant was not denied naturalization because of his membership in Fair Play For Cuba or any other organization. Thus, Thompson v. Immigration and Naturalization Service, supra, and Scythes v. Webb, 307 F.2d 905 (7th Cir. 1962), relied upon by appellant [Br. 29-34] are inapposite. It was appellant's activities, beliefs, and state of mind, rather than membership in any organization, which led the District Court to conclude that he had not met the tests for naturalization.

During the final hearing before the District Court appellant testified that he was in a "mixed up stage" during his deportation hearing in 1964 and didn't know where he stood [R. T. 157]. Appellant said that he now knows where he stands and that he is now willing to bear arms on behalf of the United States and to uphold the Constitution of the United States without any mental reservations whatsoever [R. T. 139-140, 157, 159]. Assuming this to be true, the District Court was nevertheless justified in denying appellant's naturalization; since Section 316(a) of the Immigration and Nationality Act requires a petitioner for naturalization to be attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States for five years immediately preceding the date of filing his petition.

III

APPELLANT WAS NOT DENIED A FAIR HEARING.

Appellant argues that the decision of the Supreme Court required that his deportation proceedings and the order of deportation outstanding against him be vacated; that the naturalization examiner erred in denying his motion to vacate the deportation order; and that the District Court also failed to consider the effect of the Supreme Court decision [Br. 7, 46-49]. Appellant presented essentially the same argument to this Court in No. 19,351 in his Memorandum on Behalf of Petitioner in Opposition to Suggested Order of U. S. Attorney, Prepared and Submitted in Response to This Court's Directive. Appellant submitted an order to this Court in No. 19,351 which provided for the deportation proceedings to be "vacated and set aside". However, this Court did not approve appellant's proposed order, but instead approved the order submitted on behalf of the Immigration and Naturalization Service [See Exhibit 8].

In any event, neither the naturalization examiner, nor the District Court sitting as a naturalization court, had power to set aside the deportation order against appellant [See Duenas v. United States, 330 F.2d 726, 727-728 (9th Cir. 1964)]. As discussed under Part I of Argument, supra, we do not believe that appellant's naturalization was barred by the provisions of Section 318 of the Immigration and Nationality Act even though an order of deportation

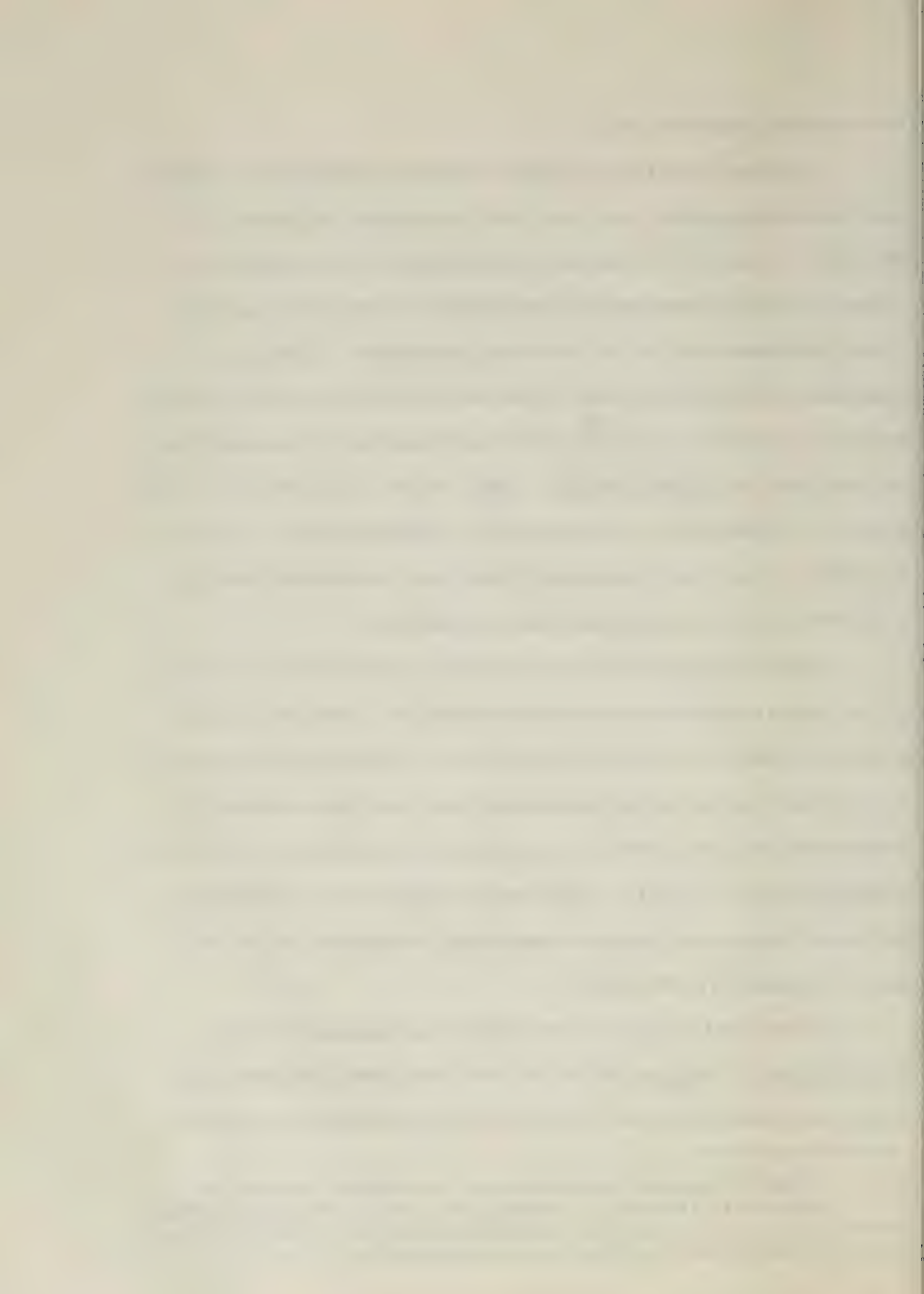
is outstanding against him.

Appellant apparently contends that the record of his deportation proceedings should not have been received in evidence [Br. 7, 46, 49]. ^{4/} Insofar as appellant's contention is based upon his claim that the deportation proceedings should have been vacated, it has been answered in the preceding paragraphs. Insofar as appellant's contention is based upon the fact that he was not represented by counsel during his deportation hearing, it was answered by this Court in Millan-Garcia v. INS, 343 F.2d 825 (9th Cir. 1965), judgment vacated and case remanded on other grounds, 382 U.S. 69 (1965). Appellant's testimony during his deportation hearing was clearly relevant and otherwise admissible.

Appellant argues that he was denied a fair hearing because of the naturalization examiner's participation in the proceedings before the District Court [Br. 39, et seq.]. During the final hearing appellant called the naturalization examiner as a witness and questioned him exhaustively concerning the reasons for his recommendation [R. T. 76-131]. Appellant also devoted a considerable portion of his opening brief in discussing the naturalization examiner's testimony [Br. 21-27].

In the first place, the decision of the Supreme Court in United States v. Morgan, 313 U.S. 409, 422 (1941) indicates that it may have been improper to call the naturalization examiner as

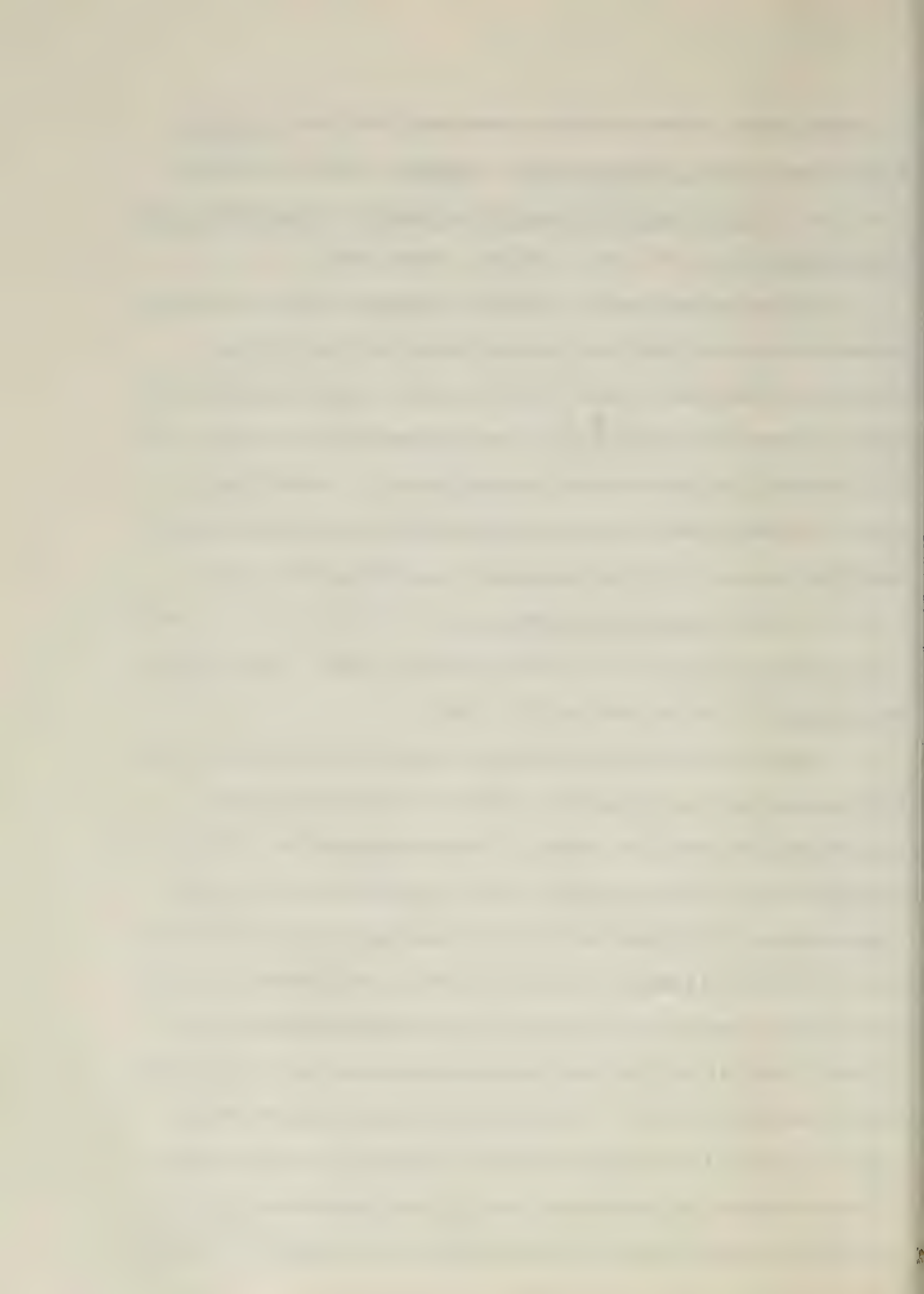
^{4/} Exhibit 3 appears to contain the deportation hearing for March 24, 1964 only; although the record of the deportation hearing for April 3, 1964 was undoubtedly before the District Court, since it is referred to in that Court's opinion [C. T. 11, 12].



a witness and to probe his mental processes [See also, Air Line Pilots' Association, International v. Quesada, 286 F.2d 319 (2nd Cir. 1961); Securities & Exchange Commission v. Shasta Minerals and Chemical Co., 36 F.R.D. 23 (D.C. Utah 1941)].

But more important, appellant's argument entirely misconceives the nature of the final hearing before the District Court. Where, as in the case at bar, a final hearing is held in open court, such a hearing is a trial de novo, and the District Court makes its own findings upon the evidence adduced before it, rather than merely reviewing the proposed findings of the naturalization examiner [See Section 336 of the Immigration and Nationality Act, 8 U.S.C. § 1447; Application of Murra, 178 F.2d 670 (7th Cir. 1950); Application of Murra, 166 F.2d 605 (7th Cir. 1948); compare: In Re Jow Gin, 175 F.2d 299 (7th Cir. 1949)].

Appellant complains that the naturalization examiner actively participated as an advocate in the District Court and as such undoubtedly influenced the District Court's decision [Br. 39-41]. This is no cause for complaint. This is exactly what the statute contemplates. While Section 335 of the Immigration and Nationality Act, 8 U.S.C. § 1446 provides for the preliminary examination of naturalization petitioners by Service employees designated by the Attorney General and for their recommendation to the court; under Section 336(d), 8 U.S.C. § 1447(d), the Attorney General has the right to appear at the final naturalization hearing before the court, to cross examine the petitioner, etc. In such an adversary proceeding, the naturalization examiner (who represents the Attorney



General) appears not in a quasi-judicial capacity but as an advocate.

It is to be expected that the naturalization examiner will try to persuade the court, just as the attorney for the petitioning alien will try to persuade the court. This does not detract from due process, since the naturalization examiner's recommendation is not binding on the court. The hearing is de novo and the court makes its own decision on the evidence before it. The District Court in the present case categorically stated that it had "arrived at its judgment independently of any findings and recommendation of the naturalization examiner" [C. T. 3; see also 266 F. Supp. at p. 547]. There is no reason to impugn this assertion by the court.

CONCLUSION

WHEREFORE, for the reasons set forth above, it is respectfully submitted that the order of the District Court denying appellant's petition for naturalization should be affirmed.

Respectfully submitted,

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FREDERICK M. BROSIO, JR.,
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Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James R. Dooley
JAMES R. DOOLEY

APPENDIX "A"

Section 318 of the Immigration and Nationality Act, 8 U.S.C.

§ 1429, provides in pertinent part:

" . . . Notwithstanding the provisions of section 405(b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act. . . ."

Section 329 of the Immigration and Nationality Act, 8 U.S.C.

§ 1440, provides in pertinent part:

"SEC. 329. (a) Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, and who, if separated from such service, was separated under honorable conditions, may be naturalized as

provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. . . .

"(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirement of this title, except that --

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 331 of this title;

(2) no period of residence or specified period of physical presence within the United States or any State shall be required;

(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

(4) service in the military, air, or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the petitioner served

or is serving, which shall state whether the petitioner served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, and was separated from such service under honorable conditions; and

(5) notwithstanding section 336(c) of this title, the petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service.

* * * *

Section 316 of the Immigration and Nationality Act, 8 U. S. C.

§ 1427 provides in pertinent part:

"SEC. 316. (a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present



therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

* * * *

DEC 11 1967

No. 22,026 ✓

In the
United States Court of Appeals
For the Ninth Circuit

JOHN A. METHEANY,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	

On Appeal from the United States District Court
for the District of Arizona

Brief for Appellant

FILED

DEC 4 1967

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No. 22,026

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Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
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Brief for Appellant

JURISDICTIONAL STATEMENT

In September of 1962 the Appellant John A. Metheany was indicted on one count of concealment of assets in bankruptcy and four counts alleging the making of a false oath. He was indicted along with a co-defendant, G. Ronald Dotson, who was indicted for concealment of assets (not the same assets that the appellant allegedly concealed). In March of 1964 the Defendant and his co-defendant were convicted on all counts by a jury in Phoenix, Arizona, in the United States District Court for the District of Arizona. The co-defendant G. Ronald Dotson received a sentence of probation and the court sentenced the Defendant Metheany to two years in the custody of the Attorney General. The Defendant-Appellant Metheany was admitted

to bail pending appeal and did file a Notice of Appeal and did argue and have his counsel orally argue before this Court on June 7, 1965. The co-defendant Dotson did not appeal and has subsequently been released from probation. In August, 1966, this Court reversed the conviction of the District Court on the grounds that severance should have been granted in the first trial. See *Metheany v. United States of America*, 365 F.2d 90 (C.C.A. 1966). Subsequently, the Honorable William Mathes was assigned by this Court to preside at the trial. Prior to the trial and motion by the Appellant the concealment count was severed from the four false oath counts. The concealment count was tried by a jury before Judge Mathes on February 6, 1967 and continued until February 8, 1967, when the jury brought in a verdict of not guilty as to the concealment count. On February 8, 1967, the jury had been impaneled and was sitting in the case concerning the four counts of false oath, a violation of Title 18, U.S.C. Section 152. Before the conclusion of the trial, Judge Mathes declared a mistrial on February 10, 1967. The false oath counts case was reset for trial on July 17, 1967, and did go to trial. The case went to the jury for deliberation on the four false oath counts on July 19, 1967, and the jury returned a verdict of guilty as to three of the four false oath counts (Counts 3, 4 and 6 of the indictment) and not guilty as to Count 5 on July 20, 1967. The defendant waived time as to sentencing and was sentenced on July 20, 1967 at 2:00 P.M. The Defendant-Appellant was sentenced to the custody of the Attorney General of the United States for a period of two years for each of the counts as to which he was found guilty, the sentences to run concurrently. The Court further ordered that the Defendant was to become eligible for parole at such time as the Board

of Paroles may determine. The Court entered an order denying bail on the grounds that the appeal was frivolous and taken for the purpose of delay within the meaning of Sub-section 2 of Section A of Rule 46 of the Rules of Criminal Procedure. Subsequently this Court, the Ninth Circuit Court of the Court of Appeals, admitted the Defendant to bail and he is presently at liberty on bail.

This matter is before this Court pursuant to Title 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

Albert Sandoval was associated with Quality Upholstery in 1952 (Vol. 1, Page 23). Ron Dotson ran the business and Sandoval owned stock in the corporation (Vol. 1, Page 24). There was a meeting held in Mr. Metheany's office between Mr. Metheany, Ron Dotson, Albert Sandoval and his father, Ignacio Sandoval (Vol. 1, Page 24). They discussed the outstanding accounts of Quality Upholstery (Vol. 1, Pages 24-27), and Albert Sandoval ended up giving a check to Mr. Metheany for \$5,800.00 (Vol. 1, Page 27). He received an accounting of the funds (Vol. 1, Page 29). Mr. Sandoval in all gave over Fifty Thousand Dollars to the corporation (Vol. 1, Page 33). The fall of 1960 Meth-eany visited Sandoval at his home in Gardenia. It would have been the 10th of December, 1960. Mr. Metheany told Sandoval that he, Metheany, was going to return some of the money on the Marko and Sun Drapery checks and he gave a check to Sandoval for \$1,285.80 (Vol. 1, Pages 35-36). Sandoval testified that he sold the fifty per cent of the stock he owned (Vol. 1, Pages 44-45). There was a special meeting of the Board of Directors and a Note drafted on April 28, 1960. Sandoval testified something was said about selling it to Sally Dotson (Vol. 1, Page 47). Sandoval was willing to sell his stock to Sally Dotson

for \$100.00 (Vol. 1, Page 49) and a Bill of Sale was drawn up by Metheany (Vol. 1, Page 49). Sandoval also testified that he got a promissory note from Sally Dotson for \$100.00 (Vol. 1, Page 50). Government's Exhibit 13. Sandoval testified that he mailed the stock certificates back to Mr. Metheany (Vol. 1, Page 52). There is much confusion as to whether or not the stock certificate was actually mailed back (Vol. 1, Pages 57-58). Sandoval paid Metheany \$750.00 for personally representing him and \$750.00 for taking care of the claims (Vol. 1, Page 60). Sandoval was advised that there might be taxes unpaid and insufficient funds checks and liability for the labor and employees who had not been paid. The Bill of Sale for the stock was never located if indeed there was one (Vol. 1, Page 66).

Ira J. Bergman testified that he received a telephone call in June of 1960 from Metheany (Vol. 1, Page 68), relative to a corporate bankruptcy (Vol. 1, Page 69), and that he met Mr. Dotson in his office (Vol. 1, Page 70). Ira Bergman testified the schedules were brought to him all prepared (Vol. 1, Page 71). Mr. Bergman had no further contact with Mr. Metheany concerning these matters (Vol. 1, Page 72). Mr. Bergman never told Metheany that he was representing Quality Upholstery (Vol. 1, Page 72). Mr. Bergman further testified that he couldn't remember Mr. Metheany ever being present when he represented Quality Upholstery (Vol. 1, Page 73).

Bob Lukas testified that he is an attorney (Vol. 1, Page 76), that Metheany called him to be the receiver and trustee (Vol. 1, Page 77). Lukas was aware of checks that Metheany had written (Vol. 1, Page 78), and asked his attorney to get the checks from Metheany (Vol. 1, Page 79). A petition for turn over order was filed (Vol. 1, Page 79). The cancelled checks were turned over to Lukas as the result of

the hearing (Vol. 1, Page 84). Two photostatic copies of the checks were turned over to Lukas (Vol. 1, Page 85). These checks were admitted over objections (Vol. 1, Pages 85-86). 10-B is the Sun Drapery check and 10-A is the Marko Fabric check (Vol. 1, Pages 87-88). Lukas had discussed the existence of these two checks prior to receiving them (Vol. 1, Page 90).

Joe Miller testified that he is a lawyer (Vol. 1, Page 96). He knows the defendant (Vol. 1, Page 97), and a few weeks before the Petition in Bankruptcy was filed he contacted Mr. Metheany (Vol. 1, Pages 97-98).

Donald Elert testified that he is a salesman, or was a salesman and purchased furniture and drapes from Quality Upholstery. As late as May, 1960, he heard from Metheany about paying the bill (Vol. 1, Pages 102-103).

Beverly Jackson testified that she was a teller in the Bank (Vol. 1, Page 109) and knew the Defendant John A. Metheany. She testified that there was one item on the tape for \$510.00 and one item for \$138.74 (Vol. 1, Page 112).

Jim Thorpe testified that he was employed by the First National Bank (Vol. 1, Page 114). He testified that certain of these checks were microfilmed on both the front and the back (Vol. 1, Page 116).

Franklin Victor testified for the Government (Vol. 1, Page 124). He purchased accounts receivable from Quality Upholstery (Vol. 1, Page 125-126).

Jim Thorpe testified as to a deposit slip (Vol. 1, Page 127).

Richard F. North testified (Vol. 1, Page 134). He testified that Metheany gave him a check as part payment on the Quality Upholstery account (Vol. 1, Page 135), and that this was given to him on May 17, 1960.

Wilbur Myers testified that he received a check from Metheany dated May 18, 1960 (Vol. 1, Page 139).

Thomas Gearty, an F.B.I. Agent testified as to the \$58,000.00 in Trust Account checks (Vol. 1, Pages 145-154).

Ronald Dotson testified for the Government (Vol. 1, Page 188). Dotson testified that around April 29, 1960, he, Metheany, Sandoval and Sandoval's father arranged that Mr. Sandoval transfer the stock of Sandoval to Dotson's wife Sally for \$100.00. Dotson then began to testify about the Sun Drapery and Marko Fabric's checks (Vol. 1, Page 198-202). These questions regarding the Government's Exhibits 10-A and 10-B which are the Marko Fabric and Sun Drapery's checks were asked and answered over the objection of counsel for the Defendant. (Vol. 1, Pages 198-200). The Court explained to the jury that the charge of concealment against Mr. Metheany was separated from the false oaths (Vol. 1, Page 207), and that the jury found him not guilty on the false oath cases (Vol. 1, Page 207). Ronald Dotson was called by the Government as a rebuttal witness and testified that Government's Exhibit Number 38, the Promissory Note in the amount of \$1,000.00, was payable to Mr. Frank Graff (Vol. II, Page 321). This particular Exhibit and the testimony concerning it is particularly important because it links Metheany with Dotson by showing the borrowing of the funds from Graff in order to pay Sandoval back the \$1,285.80. Exhibit Number 38 was admitted into evidence over the objection of the Defendant's counsel (Vol. II, Page 316). This is a particularly damaging and prejudicial exhibit.

SPECIFICATIONS OF ERROR

1. The Court erred in refusing to grant Defendant's requested instruction Number 4 which reads as follows:

"You are further instructed that due to the fact that there is no evidence in this case that the stock certificates were transferred on the stock register books

of the corporation, that there was no purchase and sale agreement for the stock and that there is no evidence that the stock was properly endorsed and new stock certificates issued. Therefore, you are instructed that there was not a valid and legal transfer of stock from Albert Sandoval to Sally Dotson.”

The instruction refused was objected to because there were not facts sufficient to show that there was a valid and legal transfer of the Sandoval stock as implied in the indictment (Vol. 3, Page 399).

2. The court was in error in not granting defendant’s requested instruction Number 1 which reads as follows:

“You are further instructed that there can be no lawful conviction in a false oath case such as this when an answer of the defendant under oath to a question propounded to him is literally accurate, technically responsive or legally truthful.”

The objection to the court’s refusal to grant this instruction was made on Page 399.

3. It was plain error for the defendant to be charged as he was in counts three and four of the indictment as those counts are contradictory of each other and furthermore amount to semantical dichotomys.

4. It was error for the court to admit evidence relating to the alleged crime of concealment of assets.

ARGUMENT I

The Court’s refusal to grant Defendant’s Requested Instruction Number 4 constituted reversible error and requires a new trial. This argument goes to Count VI of the indictment where the Defendant-Appellant Metheany was asked:

“to whom did he dispose of his stock?”

and the Defendant gave the answer:

"I don't know your honor."

Defendant's Requested Instruction Number 4 reads as follows:

"You are further instructed that due to the fact that there is no evidence in this case that the stock certificates were transferred on the stock register books of the corporation, that there was no purchase and sale agreement for the stock and that there is no evidence that the stock was properly endorsed and new stock certificates issued. Therefore, you are instructed that there was not a valid and legal transfer of stock from Albert Sandoval to Sally Dotson."

The objection to the refusal to grant this instruction is in Volume III, Page 399. There is no evidence whatsoever to indicate that Albert Sandoval's stock certificate was endorsed; in the prior trial he testified he really couldn't remember what happened to the stock certificate and at the present trial he testified that he sent it to Metheany (Vol. 1, Pages 57-58). Metheany testified that he did not have the stock register book, that he did not have the stock minute book (Vol. II, Page 268). Sally Dotson did not testify that she received a new stock certificate or the old stock certificate. There was no new stock certificate issued and although Sandoval testified about a Bill of Sale, none was introduced. Therefore, since the stock certificate itself was not introduced there was no evidence that it was endorsed, nor is there any evidence that same was delivered. Yet the Court refused to grant Defendant's Requested Instruction Number 4. Arizona has the Uniform Stock Transfer Act. Art. 10, Sec. 231 of the Arizona Revised Statutes reads as follows:

“Transfer of certificates and shares.

- A. Title to a certificate and to the shares represented thereby can be transferred only:
1. By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be owner of the shares represented thereby.
 2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the certificate, or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.
 3. The provisions of this Section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provides that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by registrar or transferred by a transfer agent.”

There was certainly no evidence at the trial that the Defendant-Appellant Metheany was a registrar or a transfer agent of the corporation even if he did receive the stock certificate from Sandoval of which there is no evidence. The provision of the Uniform Stock Transfer Act that title to stock can be transferred “only” by endorsement of the certificate or by a separate written assignment makes one or the other necessary to effectuate a transfer of title to the stock. *Longworth v. East River National Bank*, 160 App. Div. 737, 145 N.Y. State 1051. Affirmed 220 N.Y. 718, 116 N.E. 1058. Uniform Stock Transfer Act, Art. 1, 10-231 ARS.

It has been held that under the provisions of the Uniform Stock Transfer Act delivery of the certificate is essential to a transfer of the legal title to the stock. *Brennan v. W. A. Wills, LTD.* (C.A. 10 Colo.) 263 E.2d Certiori denied 360 U.S. 902, 3 L.Ed.2d 1254, 79 Sup. Ct. 1284; *Johnson v. Johnson*, 300 Mass. 24, 13 N.E.2d 788.

ARGUMENT II

The Court was in error in not granting Defendant's Requested Instruction Number 1. In vol. 3, Page 399 of the Transcript the Defendant-Appellant made timely objection to the Court's refusal to grant Defendant's Requested Instruction Number 1. Defendant's Requested Instruction Number 1 reads as follows:

"You are further instructed that there can be no lawful conviction in a false oath case such as this when an answer of the Defendant under oath to a question propounded to him is literally accurate, technically responsive or legally truthful."

Certainly that particular instruction was applicable in this case as to the three counts on which the Defendant was found guilty because the Defendant's contention always was that these answers given by him were legally truthful, literally accurate and technically responsive. This Defendant's Requested Instruction Number 1 is certainly an applicable rule of law as laid down in *Smith v. United States*, (C.C.A. 6, 1948), 169 F.2d, 118, at page 121. There the Court said:

"There can be no lawful conviction in a perjury case when an answer of the Defendant under oath to a question propounded to him is legally, truthful, technically responsive or literally accurate."

This Court has always applied that principle. See *Hart v. United States* (C.C.A. 9, 1942) 131 F.2d 59 at Page 61.

ARGUMENT III

Argument III was plain error according to Rule 52b of the Federal Rules of Criminal Procedure, that this Court noticed the plain error as to the contradiction in the indictment and the impossibility of the Defendant defending himself against Counts III and IV of the indictment. Count III of the indictment is essentially that Mr. Metheany gave a false answer when in response to the question "Mr. Metheany do you recall the approximate date that you ceased to act as an attorney for Quality Upholstery, Inc.", he said the approximate date would be the first of March. The indictment charges when in truth and in fact as he then well knew he continued to be attorney for Quality Upholstery until on or about June 1, 1960. In Count IV of the indictment he was charged with perjury because he said he only knew that it was Ira Bergman that was the attorney for that period of time and that was only through hearsay. He had no personal knowledge of this. Well, it's very simple, the Government introduced a great deal of evidence to show that it was Ira Bergman who was the attorney for the bankrupt prior to June, 1960 when the company filed bankruptcy. The Government also introduced evidence that it was Metheany who was the attorney. Therefore, this was the type of question; when did you quit beating your wife last week, because it was impossible for both of them to have been the attorney at the same time and therefor it was impossible for both of them to have been the attorney at the same time and therefore it was impossible for him to defend himself against these charges. This Court has the authority to notice this as plain error according to *Silber v. United States*, 1962, 370 U.S. 717, 8 L.Ed.2d, 798, 82 Sup. Ct. 1287.

ARGUMENT IV**Evidence Relative to the Crime of Concealment, of Which the Defendant Was Acquitted, Was Improperly Admitted in the Defendant's Perjury Trial**

The underlying doctrine of law upon which this argument rests is concisely set forth in *Hurst v. United States*, 337 F.2d 678 (5th Cir., 1964)

"There probably is no better known rule of common law criminal practice than that Courts are careful to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt."

This rule secures the Defendant's right to be tried for a specific crime based upon evidence relevant only to that crime, having for its underpinnings the concept of fundamental fairness. This basic proposition has been eroded by two basic exceptions. The first exception is the use of a prior conviction for impeachment purposes. The second exception to the rule excluding evidence of other misconduct by the Defendant permits such evidence where the basic purpose for the introduction of such evidence is the proof of an essential element of the crime and such evidence incidentally implicates the Defendant in other wrongdoings. For example, in *DeVore v. United States*, 368 F.2d 396 (9th Cir. Ct. of Appeals 1966), this Court said

"... and it is axiomatic that evidence which tends to prove a material fact may be admitted even though it also discloses the commission of an offense other than the one charged."

The record clearly indicates in the instant case that the questioned evidence was not adduced for the purposes of impeaching the Defendant. We must then view the evidence to determine whether it comes within the stated

exception, i.e., whether the evidence proves a material allegation of the crime charged. None of the perjury counts relate to the concealment of assets. He was not charged with a false oath that he denied concealing assets. In *Diaz-Rosendo v. United States*, 364 F.2d 941 (9th Cir. Ct. of Appeals, 1966), the Defendants appealed from a conviction of a conspiracy to violate the laws of the United States, particularly to defraud the United States by importing marijuana into the United States from Mexico; failing to declare marijuana at the border and to conceal the transportation of marijuana which had been imported into the United States and secondly charge the appellants with aiding and abetting one Murrillo to smuggle marijuana into the United States.

The relevant facts are that on January 24, 1965, an automobile in which three persons other than the Defendants were riding was stopped and searched at the border and marijuana was found therein. Also found in this car was the address of the Hollywood Center Motel. All of the marijuana except one package was removed from the car and the customs agent drove the car to Los Angeles with one of the original passengers. In Los Angeles the customs agent was replaced by a Federal Bureau of Narcotics agent, who drove the automobile in the company of Murrillo to the Hollywood Center Motel. The defendant approached the car at which time the passenger Murrillo had a conversation with Diaz-Rosendo, which conversation indicated that Diaz-Rosendo had the money apparently to make a purchase. As the defendants walked away from the automobile toward an arranged meeting, they were arrested.

On the following day, the automobile in which the defendants had arrived at the scene was searched and a small

quantity of marijuana was discovered therein. The evidence concerning this marijuana was strongly objected to at the trial. The introduction of this evidence was found by the Court to require reversal and held "We do not see how, or in what manner, it can be said that whatever crime may have been committed in the possession, transportation, or concealment of such marijuana, it in any way relates to or tends to prove the commission of the separate and distinct crimes set forth in the indictment. The general rule is well established in this circuit, as elsewhere, that when a defendant is on trial for a specific offense, evidence of a distinct offense unconnected with that charged in the indictment is not admissible." *White v. United States*, 192 F.2d 595, 13 Alaska 513 (9th Cir., 1951); *Bowie v. United States*, 345 F.2d 605 (9th Cir., 1965).

Applying this rule to the instant case, Appellant must confess that he is unable to determine any material allegation of the charges on which he was tried which were proved by the admission of the evidence complained of. After counsel for Appellant again asked for the removal of 10a and 10b, the Court said they were introduced for the limited purpose of showing state of mind (Vol. II, Page 335). In *Buatte v. United States*, 350 F.2d 395 (9th Cir., 1965), the Defendant was subsequently charged with the murder of another person and evidence concerning the first murder was introduced at the second trial. In applying the exception to the general rule stated above, the Court stated "The evidence that Buatte shot Alice Sucotti was part of the overall occurrence. Moreover, even though the murder conviction was set aside and an acquittal entered, the evidence that Buatte shot Alice Sucotti was relevant to show that his shooting of Dan Sucotti was not a mistake

or accident, and it was relevant to the issue of intent.” While Appellant disagrees with the premise of this finding, i.e., that an acquittal is not a bar to the use of evidence in a subsequent trial as a circumstance showing guilt, see *State v. Little*, 87 Ariz. 295, 350 P.2d 756 (1960), Appellant does agree that the evidence offered and objected to in the *Buatte* case was relevant in that this evidence indicated that the defendant had not shot Dan Sucotti by mistake or accident, nor did he do it unintentionally.

We strongly urge this Court, in examining the instant case, to compare it with the facts in *DeVore v. United States*, *supra*. It is obvious from such a comparison that the conclusion reached in *DeVore*, that such evidence was prejudicial and required reversal, must be the identical conclusion reached in the instant case.

When such an examination of the evidence in the instant case is made and the conclusion arrived at that the prejudice to the defendant far outweighed the benefit to the prosecution, the additional fact is added that this defendant was acquitted of the crime of concealment, it becomes increasingly clear that the evidence should not have been admitted. See *State v. Little*, *supra*, at page 763 of the Pacific Reporter. The Arizona Supreme Court held, in *State v. Little*, *supra*, “the fact of an acquittal, we feel, when added to the tendency of such evidence to prove the defendant’s bad character and criminal potencies, lowers the scale on the side of inadmissibility of such evidence.” The Arizona Supreme Court went on to say, at page 764 of the Pacific Reporter, “the verdict of acquittal should relieve the defendant from having to answer again, at the price of conviction for that crime or another, evidence which amounts to a charge of a crime of which he has been

acquitted." The Tenth Circuit Court of Appeals in *Welch v. United States*, 371 F.2d 287 (1966), propounded the following statement, at page 293 of the Federal Reporter, "evidence of the commission of crimes not charged, as such, is not admissible; evidence of unlawful conduct material to the crime charged should not be admitted if its admission diverts the case into a 'trial within a trial' and in actuality exposes defendant to a conviction for a crime not charged." Appellant believes that this is precisely what occurred at his trial in the Court below. The defendant was not only required to defend for perjury charges, but was also required to defend for a second time the concealment count, a procedure which the defendant believes to be fundamentally unfair.

In applying this balancing test to determine the admissibility of evidence, this Court determined in *Reed v. United States*, 364 F.2d 630 (9th Ct. App. 1966), that the defendants who were charged with three counts of transporting kidnapped persons in interstate commerce were not erroneously convicted based upon evidence showing that they had, immediately preceding the kidnapping, engaged in armed robbery. The evidence clearly explained the motive for the kidnapping and was, therefore, properly admitted as evidence. With this holding we agree, but again point out to this Court that the admission into evidence of testimony in documents relating to certain checks described in the concealment count, of which the defendant was acquitted, could not in any way shed light or prove any of the elements in the charges of perjury, were extremely prejudicial to the defendant, and would require reversal by this Court.

CONCLUSION

Therefore, we request that a judgment of acquittal be entered and the sentence set aside or in the alternative that a new trial be granted for the trial court's error in refusing to give certain instructions and for the erroneous admission of evidence.

Respectfully submitted,

SHELDON GREEN

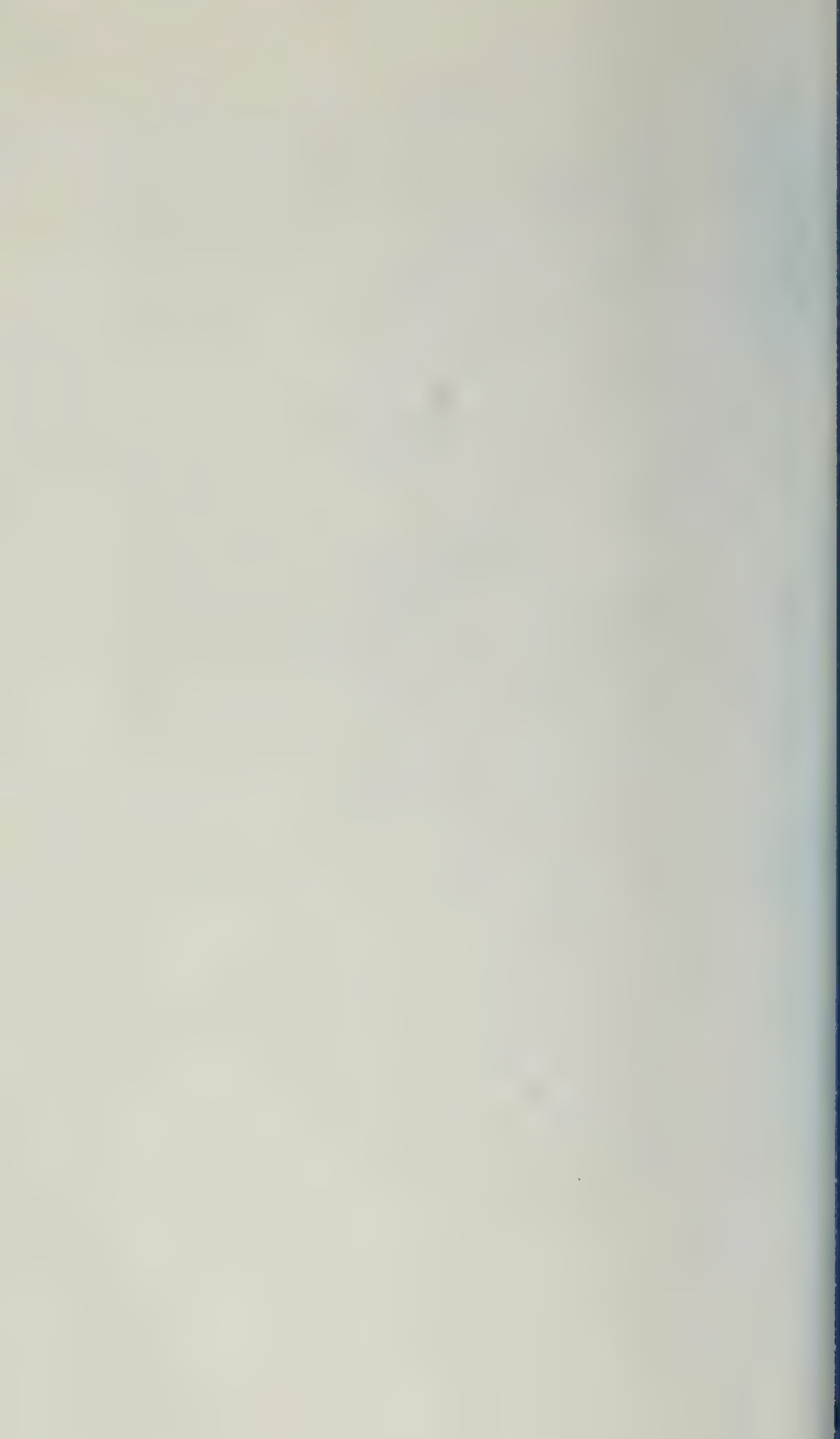
Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with those rules.

SHELDON GREEN

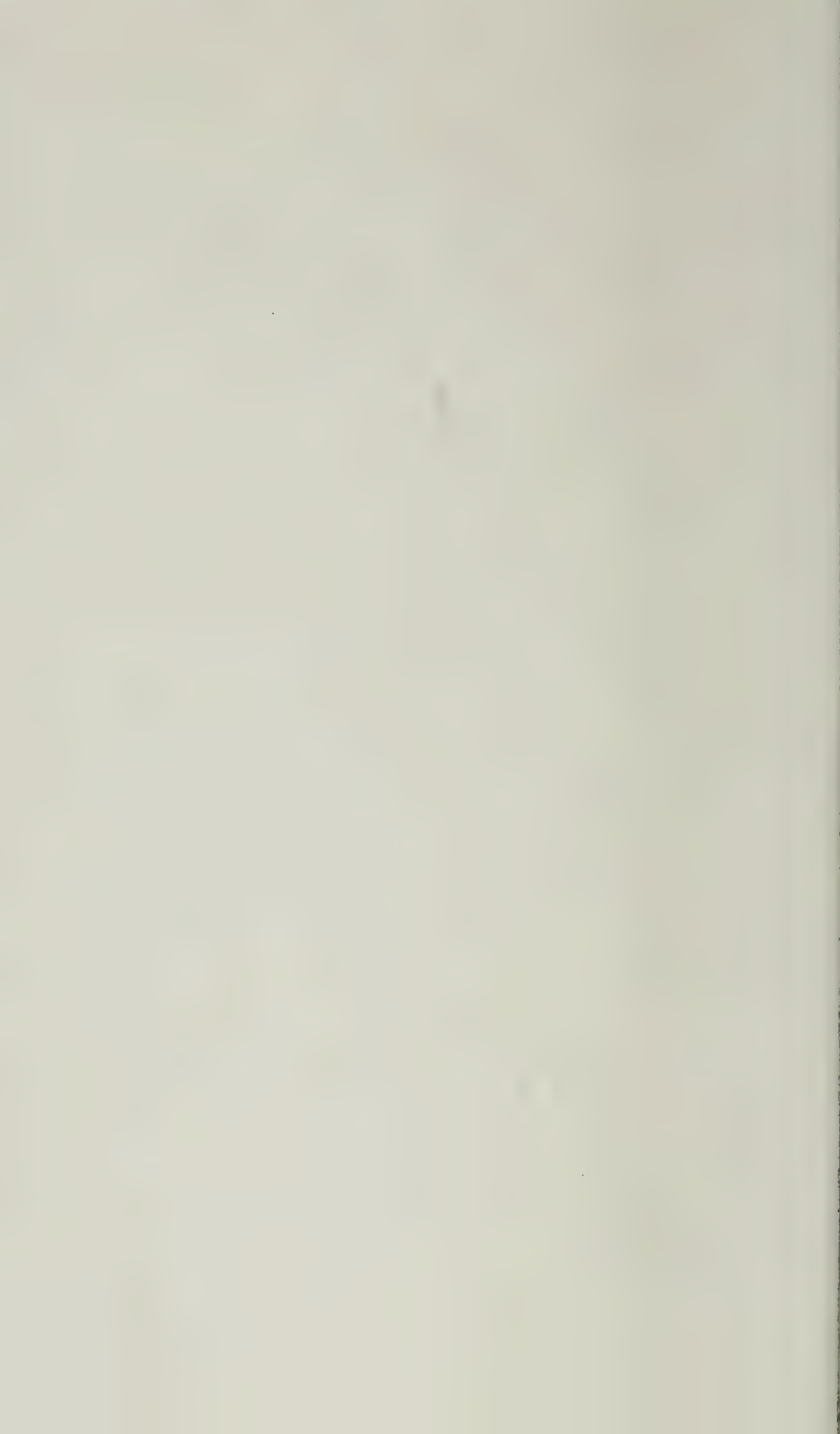
Sheldon Green





Appendix

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Exhibit Number 10-B	Introduced into evidence Page 86
Exhibit Number 38	Marked for identification Page 300 and introduced into evidence Page 316



NO. 22,026

IN THE
United States
Court of Appeals
For the Ninth Circuit

JOHN A. METHEANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

FILED

DEC 18 1967

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NO. 22,026

IN THE

United States
Court of Appeals
For the Ninth Circuit

JOHN A. METHEANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

In September of 1962 the Appellant John A. Metheany was indicted on one count of concealment of assets in bankruptcy and four counts alleging the making of a false oath. He was indicted along with a co-defendant, G. Ronald Dotson, who was indicted for concealment of assets (not the same assets that the appellant allegedly concealed). In March of 1964 the Defendant and his co-defendant were convicted on all counts by a jury in Phoenix, Arizona, in the United States District Court for the District of Arizona. The co-defendant G. Ronald Dotson received a sentence of probation and

the court sentenced the Defendant Metheany to two years in the custody of the Attorney General. The Defendant-Appellant Metheany was admitted to bail pending appeal and did file a Notice of Appeal and did argue and have his counsel orally argue before this Court on June 7, 1965. The co-defendant Dotson did not appeal and has subsequently been released from probation. In August, 1966, this Court reversed the conviction of the District Court on the grounds that severance should have been granted in the first trial. See *Metheany v. United States of America*, 365 F.2d 90 (C.C.A. 1966). Subsequently, the Honorable William Mathes was assigned by this Court to preside at the trial. Prior to the trial and motion by the Appellant the concealment count was severed from the four false oath counts. The concealment count was tried by a jury before Judge Mathes on February 6, 1967 and continued until February 8, 1967, when the jury brought in a verdict of not guilty as to the concealment count. On February 8, 1967, the jury had been impaneled and was sitting in the case concerning the four counts of false oath, a violation of Title 18, U.S.C. Section 152. Before the conclusion of the trial, Judge Mathes declared a mistrial on February 10, 1967. The false oath counts case was reset for trial on July 17, 1967, and did go to trial. The case went to the jury for deliberation on the four false oath counts on July 19, 1967, and the jury returned a verdict of guilty as to three of the four false oath counts (Counts 3, 4 and 6 of the indictment) and not guilty as to Count 5 on July 20, 1967. The defendant waived time as to sentencing and was sentenced on July 20, 1967 at 2:00 P.M. The Defendant-Appellant was sentenced to the custody of the Attorney General of the United States for a period of two years for each of the counts as to

which he was found guilty, the sentences to run concurrently. The Court further ordered that the Defendant was to become eligible for parole at such time as the Board of Paroles may determine. The Court entered an order denying bail on the grounds that the appeal was frivolous and taken for the purpose of delay within the meaning of Sub-section 2 of Section A of Rule 46 of the Rules of Criminal Procedure. Subsequently, this Court, the Ninth Circuit Court of the Court of Appeals, admitted the Defendant to bail and he is presently at liberty on bail.

This matter is before this Court pursuant to Title 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

The Appellant is an attorney who resides in Phoenix, Arizona (Tr. 266). The Appellant served as an attorney for a concern known as Quality Upholstery, Inc. prior to its filing a petition in bankruptcy (Tr. 267-271-272). One Albert L. Sandoval served as the President of the concern until April of 1960 (Tr. 267). He was succeeded by Ronald Dotson (Tr. 267). On or about May 27, 1960, the Appellant received from Mr. Sandoval the sum of \$5800.00, to be used for the purpose of paying various creditors of Quality Upholstery, Inc. The funds were to be used for bills of Quality Upholstery, Inc. and not Ronald Dotson (Tr. 272). In connection with this employment, the Appellant, on May 27, 1960, sent Mr. Sandoval an accounting of the disbursement of the funds (Tr. 31). The letter recited that the sum of \$510 had been paid to a concern designated as Marko Fabric, and the sum of \$775.80 had been paid to a concern known as Sun Drapery. The letter also recited that the sum of \$97.25

was paid to a concern known as Riviera. Mr. Dotson, who was the Manager of Quality Upholstery, Inc. testified that the corporation did not have any creditors by this name (Tr. 197). A petition in bankruptcy was filed by Quality Upholstery, Inc. on June 17, 1960 (Tr. 72). The attorney for Quality Upholstetry, Inc. in the bankruptcy proceedings was Ira Bergman (Tr. 69 through 72). Ira Bergman had been asked by the Appellant in June, 1960 if he would handle the corporate bankruptcy of Quality Upholstery, Inc. due to a conflict of interest (Tr. 69). Robert A. Lukas was appointed Receiver of Quality Upholstery, Inc. at the instance of the Appellant (Tr. 77). In that capacity he received information that funds had been advanced by Mr. Sandoval to the Appellant to be disbursed on behalf of Quality Upholstery, Inc. (Tr. 78-79). He endeavored without success to obtain the cancelled checks relating to the transaction (Tr. 79). Subsequently he caused to be filed a petition in the bankruptcy court for a turnover hearing. This hearing was held on January 29, 1962 before the Honorable Estes Snedecor (Tr. 80). A transcript of the proceedings of that hearing is reproduced as Appendix No. 1. On the basis of the testimony at that hearing, the Appellant was indicted on four counts of false oath in violation of Title 18 U.S.C. Section 152. On July 17, 1967, the Appellant was convicted following trial by a jury on Counts 3, 4 and 6 of the indictment.

ARGUMENT I

The Court did not err in refusing to give Defendant's Requested Instruction Number 4. Initially it should be noted that counsel for Appellant has not reproduced the entire colloquy that occurred concerning the stock. It was as follows:

“Q. To whom did he dispose of his stock ?

A. I don't know, your Honor.

Q. You don't know ?

A. I know that he did ; I didn't handle that transaction.”

The Appellant was not asked whether a legally valid transfer of stock was effected. The question was forthright and the answer unequivocal. It was, therefore, proper to allow the jury to decide if the answer was false and knowingly and fraudulently false. That he did, indeed, handle the transaction was testified to by Ronald Dotson (Tr. 196) and Albert Sandoval (Tr. 44-52), and by government Exhibit No. 13 and government Exhibit No. 15.

ARGUMENT II

The Court did not err in not granting Defendant's Requested Instruction Number 1. The requested instruction was refused as covered ; however, counsel was given an opportunity to offer any additional language for clarification (Tr. 400). The Court properly left to the jury to decide what the question meant to the Defendant when he answered (Tr. 391). In that respect see *United States v. Owen Lattimore*, 127 F.Supp. 405 (U.S.D.C. 1955) affirmed 98 U.S.App. D.C. 77, 232 F.2d 334, (1955) ; *United States v. Loretta Wall*, 371 F.2d 398 (6 C.A. 1967) ; *United States v. Marchisio*, 344 F.2d 653 (2 C.A. 1965) ; *United States v. Diogo*, 320 F.2d 898, 907 (2 C.A. 1963). With respect to the Requested Instructions, it is of interest to note that Appellant's Requested Instruction Number 3, which is set forth verbatim in Appendix No. 2, was withdrawn by the Appellant (Tr. 399, 400). The instruction given to the jury (Tr. 391) stated the applicable law.

ARGUMENT III

Counts III and IV of the indictment did not overlap nor were they so intermingled to the extent Appellant could not defend himself against the charges.

Count III of the indictment alleged that the Appellant was asked:

“Mr. Metheany, do you recall the approximate date on which you ceased to act as attorney for Quality Upholstery, Inc.?”

The said defendant gave the answer, “The approximate date would be the first of March, 1960.”

The indictment further stated that the Appellant had continued in the capacity as attorney for Quality Upholstery, Inc. until on or about June 1, 1960. The government introduced evidence to show this answer was false by the testimony of Donald Elert (Tr. 102-105); Gertrude Hall (Tr. 154-160); Ronald Dotson (Tr. 189-192); Joseph Miller (Tr. 96-100); as well as government's Exhibit No. 6 and government's Exhibit No. 7.

Count IV of the indictment related to the following question:

“Do you have any knowledge, personal knowledge, as to who may have acted as attorney for the corporation subsequent to that time and prior to its preparation for the filing of petition for bankruptcy?”

The said Defendant gave the answer, “Only through hearsay. I have no personal knowledge.”

The indictment went on to allege that the Appellant did have personal knowledge that Ira J. Bergman had become attorney for the corporation at the Appellant's request. Attorney Bergman testified that he re-

ceived a telephone call from the Appellant in the middle of June, 1960 (Tr. 68), and prior to that had not done any work for Quality Upholstery, Inc. (Tr. 75). No evidence to the contrary was introduced. The Appellant knew of the employment of Ira Bergman as the attorney for Quality Upholstery, Inc. both by reason of the phone call and by personally being present at various Court hearings (Tr. 92); government Exhibit 31; and government Exhibit 32.

ARGUMENT IV

It was not error for the Court to admit evidence of Appellant's handling of funds entrusted to him by Albert Sandoval in connection with the trial on the false swearing counts.

Appellant's counsel, apparently for some strategic reason, chose to advise the jury that the Appellant had been acquitted on a charge of concealment of assets growing out of this bankruptcy (Tr. 207). He later referred to the same matter in the final argument (Tr. 355). Evidence concerning the handling of monies entrusted to the Appellant by Albert Sandoval was introduced solely on the question of motive as bearing on the issue of intent with relation to the alleged false statements made at the January 1962 hearing. This was emphasized by counsel for the government in opening statement (Tr. 12, 17) as well as in opening argument of government counsel (Tr. 347) and again in closing argument of government counsel (Tr. 372). The jury was also instructed as to the limited basis on which the evidence was admitted (Tr. 384). That the jury understood the instructions and faithfully followed them can be seen by the acquittal of Appellant on Count V of the indictment. This count alleged

the defendant testified falsely when he said he had no records of the bankrupt. The government contended this answer was false as the Appellant had the cancelled checks concerning the disbursement of the funds given him by Albert Sandoval. The jury apparently felt that a legitimate dispute could exist over whether the cancelled checks were the records of the bankrupt or Albert Sandoval. The evidence was properly admitted as bearing on motive. It was also properly admitted to negate lack of innocent purpose. It was incumbent on the government to show that the Appellant had a distinct purpose for refusing to turn the cancelled checks over to the Trustee in bankruptcy, and to accomplish that end gave the false answers.

Devoid of any background information concerning the handling of the Sandoval money, a jury might well surmise that the false answers were actually innocent misrecollections. It was essential to the prosecution of the case by the government to show that this was not true. See *Schwartz v. United States*, 160 F.2d 718 (C.A. 9, 1947), *Reed v. United States*, 364 F.2d 630 (C.A. 9, 1966), and Wigmore Evidence Vol. II, 306.

CONCLUSION

Appellee submits that the case was properly submitted to the jury for determination of the facts after being duly instructed as to the applicable law and that the judgment entered herein should be affirmed.

Dated this 15th day of December, 1967, at Phoenix, Arizona.

Respectfully submitted,

EDWARD E. DAVIS

United States Attorney

RICHARD C. GORMLEY

Assistant U.S. Attorney

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

RICHARD C. GORMLEY

Assistant U.S. Attorney

(Appendices Follow)

Appendix No. 1

*In the District Court of the United States
District of Arizona*

In the Matter of

Quality Upholstery, Inc.,

Bankrupt.

No. B-4486-Phx

Phoenix, Arizona

January 29, 1962

2:00 o'clock p.m.

Before: Hon. ESTES SNEDECOR, Referee in Bankruptcy

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Prepared for:

Mr. James J. Brosnahan, Jr.,
Assistant U.S. Attorney.

APPEARANCES:

For the Trustee,
Robert Lucas:

MR. TOM ROOF
Attorney at Law

For the Respondent
John Metheany:

MR. RALPH R. KNIGHT
Attorney at Law

Phoenix, Arizona
January 29, 1962
2:00 o'clock p.m.

The Court: Now we have this matter of Quality Upholstery.

Mr. Roof: Ready for the petitioner, your Honor.

Mr. Knight: If the Court please, I am Ralph Knight, attorney; I represent the respondent, Mr. John Metheany.

Mr. Roof: If the Court please, I am Tom Roof, attorney for the petitioner in this matter; this is Robert A. Lucas, trustee, who is also present.

I might acquaint the Court very briefly with what our petition is here.

The Court: I have read the petition. Are you ready to proceed?

Mr. Roof: Ready to proceed, your Honor, if the Court is ready.

We would like to ask that Mr. John Metheany, the respondent in this matter, be sworn.

JOHN METHEANY

called as a witness herein, having been first duly sworn upon his oath, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Roof:

Q. Would you state your name, please.

A. John Metheany.

Q. And where do you reside, sir?

A. Phoenix, Arizona.

Q. I see. And what is your occupation or profession, sir?

A. Attorney at law.

Q. I see. Mr. Metheany, did you serve as attorney for Quality Upholstery, Inc., prior to its filing a petition in bankruptcy?

A. Some time prior thereto I did, not at the time of the filing.

Q: And at the time of the filing did you have a certain professional relationship with Mr. Albert Sandoval?

A. At the time of filing, and I take it you again refer to the Quality Upholstery bankruptcy.

Q. When I say "Upholstery," yes.

A. At that time, and for some time prior thereto, I was retained as attorney for Albert Sandoval and his father, Ignacio Sandoval, for matters concerning their interest in the corporation.

Q. Mr. Metheany, were you representing the two Mr. Sandovals about May 1, 1960?

A. In certain matters I was, yes, sir.

Q. Did Mr. Albert Sandoval send you a check about May 1, 1960, in the sum of \$5,800 to disburse for and on behalf of Quality Upholstery, Inc.?

Mr. Knight: If the Court please, I am going to object to that question at this time. I don't think there is any foundation for it.

First of all, as I understand the petition on behalf of the trustee, the contentions supporting this order to show cause are predicated upon the attorney-client relationship as between the bankrupt, Quality Upholstery, and the respondent, John Metheany; and until that has been established, I think anything else is without foundation and immaterial at this time. I think it

is incumbent upon the petitioner to first establish that proposition.

Mr. Roof: If the Court please, in response to counsel's objection here, I think the Court can take judicial notice as a part of the trial the fact that the bankruptcy petition has been filed, the date of its filing, the fact of the trustee's appointment; and, we believe on that basis, that the question is a proper one, your Honor.

The Court: Well, your point is that he was not acting for the bankrupt corporation?

Mr. Knight: That's right, your Honor. The question before the witness concerns a transaction with some other client.

Now, I say it is incumbent upon the petitioner at the outset of this hearing to establish an attorney-client relationship as between Mr. Metheany, the respondent, and Quality Upholstery. That is why we are here today. They have alleged that in the complaint. They say, "...as the then acting attorney for Quality Upholstery, Inc., an Arizona corporation."

Therefore, necessarily, as foundation for any question to this witness, they are going to have to establish that relationship. That is the basis of the whole order to show cause petition, and they at this time have not put any evidence before the Court concerning that relationship, which we say is a very basic foundation that they must lay before they can go further in this interrogation. That is the basis of our objection.

Mr. Roof: If the Court please, then we'll strike that question and proceed in another fashion.

The Court: All right.

Q. By Mr. Roof: Mr. Metheany, do you recall the approximate date on which you ceased to act as attorney for Quality Upholstery, Inc.?

A. The approximate date would be the first of March of 1960.

Q. Do you have any knowledge, personal knowledge, as to who may have acted as attorney for the corporation subsequent to that time and prior to its preparations for the filing of a petition for bankruptcy?

A. Only through hearsay. I have no personal knowledge.

I can state that I have seen the petitions in bankruptcy of the corporation on file in this court, which I note are signed by Ira Bergman, of whom I have personal knowledge is an attorney at law, licensed in the State of Arizona.

I might also add that I am attorney of record in this bankruptcy, not for the corporation, but for Albert and Ignacio Sandoval, and have filed documents on their behalf and as their attorney in this cause both the creditors' claim and a request that Mr. Lucas be appointed trustee in this matter.

Q. Mr. Metheany, do you have any records of the bankrupt corporation in your possession, or do you know of the location of any of the bankrupt corporation's records apart from those records, of course, which the trustee holds?

Mr. Knight: I am going to object to the form of the question. I think it's too general. It is not confining enough. Therefore, it is improper.

I think the question should be confined to a certain time or within certain dates, or at least give the witness some idea of what records the question concerns. On that ground, we will object.

The Court: I will overrule the objection. He has been asked whether he has any such information. He can tell us what information he has, and then we can go into more particular items.

The Witness: Your Honor, may I ask permission to have the Reporter reread the question to me?

The Court: Read the question.

(Question read.)

The Witness: The answer to the first part of the two-fold question, no, I have no records of the bankrupt corporation, except for copies of the creditors' claim and petition that I filed on behalf of the Sandovals.

As to the second part of the question, I know of no person outside of the possibility of the attorney for the bankrupt corporation, as I mentioned before, Ira Bergman, to whom I did turn over certain documents at the request of the trustee, and, I am advised, were then turned over to the trustee.

Q. By Mr. Roof: Calling your attention to the time on or about May 1, 1960, did you receive a check from Mr. Sandoval to disburse for and on behalf of the bankrupt corporation?

Mr. Knight: If the Court please, I am going to have to object again to this line of questioning on the ground that it is completely without foundation at this point. Now, the only evidence before the Court is that

Mr. Metheany was, on May 1st, 1960, not the attorney for Quality Upholstering. I think that the whole basis of this petition either will rise or fall on that proposition.

Any question beyond the establishment of this is going to be improper. Now, unless counsel is willing to avow that he is going to establish that Mr. Metheany was an attorney for the bankrupt on that date, I am going to object to any questions beyond that point, because that is one of the basic requirements to establish why this respondent should be here today, and haven't done it at this time, no evidence on it at all.

Mr. Roof: If the Court please, what the trustee brings before the Court is a request for records, if there are records of the corporation. Strike that.

What we are seeking is records of the corporation. There may be a dispute as to whether or not there are records or not, but I don't believe it is material that he was attorney for the corporation that date, as to whether or not he should answer the question. Probably the trustee will. The petition may be in error in stating that he is or was the attorney on the date set forth, May 1, 1960, and I think his testimony has shown that he was not.

Whether he was or was not the attorney, this affects the public interest, and he did or did not receive the check, and I believe that the Court is entitled to know that answer.

Mr. Knight: If the Court please, I am sure the Court agrees that—

The Court: Just a minute. I don't know whether I do or not, but go ahead.

Mr. Knight: I am sure the Court agrees with this: we must proceed in an orderly fashion in this matter.

The Court: Yes, I agree on that.

Mr. Knight: And certain evidence is going to necessarily have to be produced before the trustee can go further in this matter.

Now, as I take it from what counsel has just said, by their own admission they have no knowledge in fact that Mr. Metheany was the attorney for Quality Upholstering.

So I think the Court will agree that things have to be done, first things first. First we are going to have to establish that this man was their attorney before we can establish any responsibility in him or any obligation in him or any duty in him.

On that basis, we still object.

The Court: Are you basing the objection on the fact that they allege that he was the attorney for the bankrupt after the time? Is that what you are saying?

Mr. Knight: Yes, your Honor. And I say they necessarily had to, or this petition would have no legal effect at all. And they did allege it, and now they have fallen in their proof on that point. I would move that this whole thing be quashed.

The Court: I would disagree with you. They have framed this in such a way as to ask this man whether he was an attorney or not, whether he received some money from a creditor to be used in a certain manner for disbursement to creditors of the bankrupt.

Now, if he had money which was given to him for that purpose, I still think we have a right to ask him

what he did with it and whether it was disbursed accordingly.

Suppose we have an escrow agent, somebody has paid him money for the benefit of a bankrupt. We can bring him in here and ask him to account for that money. He was an agent, anyway, and money was paid to him, we assume. If he says it wasn't paid to him, that is the end of it.

But I think he should answer this question as to whether or not within, apparently, approximately a month before the filing of this petition he received money which was received to be disbursed on behalf of the bankrupt corporation. I think we can ask that question.

Mr. Knight: May I correct the Court on one point?

The Court: Yes.

Mr. Knight: I believe the Court said that the money was received or the money alleged to have been received was paid to Mr. Metheany by a creditor of the corporation. That isn't even alleged in here, that Mr. Sandoval was a creditor of the corporation.

The Court: I don't care what is alleged. I want to know whether there was money paid. We can always amend the pleadings to conform to the facts that are developed.

So I am going to overrule your objection so that he can answer, and I will ask the Court Reporter to read the question again.

(Question read.)

The Witness: In view of my testimony so far, your Honor, setting forth that I am attorney for Albert

Sandoval and was at the time covered by this question, and further, in view of the Arizona Revised Statutes, Section 12-2234, covering the privilege of attorney and client, wherein I am prohibited from testifying or divulging any matters that my clients, Albert and Ignacio Sandoval, have not given me the specific right to divulge, I must claim this privilege on their behalf and respectfully decline to answer this question.

The Court: May I ask a question or two.

By the Court:

Q. Was your client an officer of this corporation or merely a creditor?

A. He was—Was he a creditor? No, he was not a creditor.

Q. Not a stockholder?

A. He was a stockholder. And—let me think for a moment. He was—yes, he was a stockholder and a creditor prior to the bankruptcy. At the time of the bankruptcy and for roughly a month prior thereto he was no longer a stockholder or a director; he was a creditor.

Q. To whom did he dispose of his stock?

A. I don't know, your Honor.

Q. You don't know?

A. I know that he did; I didn't handle that transaction.

Mr. Roof: If the Court please, does the Court have any further questions at this point?

The Court: No.

Mr. Roof: In response to Mr. Metheany's invoking the attorney-client privilege, I would like to—this is in the nature of argument to the Court on this particular point—point out to the Court that the attorney-client privilege can be claimed by the client only. I believe that is the majority rule. That is the rule in Arizona.

It is as to those things peculiarly a matter of litigation or in the field of legal advice and not as to so-called non-legal matters which any third party or agent might do, and it can be waived, either expressly or impliedly. It can be waived expressly by the verbal recounting of the thing which is claimed to be a privilege, or it can be waived by an interception or a delivery of a written communication. And we therefore say that the attorney might not claim the privilege for and on behalf of the client.

We further urge the Court that a disbursement of funds, if in fact such thing happened, which is just an allegation before the Court at this point, would be a non-legal matter, and we make an offer of proof for the Court that it has in fact been waived—it is not in the record yet, but we would make an offer of proof to that extent, that it has been waived in writing by its delivery to third parties.

The Court: Well, do you want to offer that proof? What is it?

Mr. Roof: Pardon me? I didn't understand you.

The Court: You say you have some proof that it has been waived.

Mr. Roof: We can offer that.

The Court: That the privilege is waived?

Mr. Roof: It will require substantiation. I am anticipating counsel here, who is capable, who would want to authenticate it, and it would require bringing someone else in.

The Court: Well, what do you have to say?

Mr. Knight: I would like to be heard concerning what counsel said concerning our statute on the attorney-client privilege.

I don't have our statute in front of me, but I have read it, and read it recently, and it says in these words, "An attorney shall not, without the consent of the client, divulge, disclose . . ." et cetera.

Now, that certainly doesn't make it a situation where the client can invoke it only. It makes it a duty incumbent upon the attorney to do so.

And if he should breach it, he would be in violation of the statute, and certainly under the canons of legal ethics would be subject to censure.

So I say it requires more than a waiver by the client or invoking by the client, but actually consent to his attorney to allowing him or releasing him from the prohibition of the statute.

The Court: Well, that is my usual understanding of a statute similar to this. I am not familiar with yours.

Are you saying that his client has given him consent? Do you have any evidence to that effect?

Mr. Roof: Your Honor, we can offer it at this particular moment. It would not be subject to an attack by counsel, I am candid to admit, but we can bring to the Court someone who would authenticate the fact that the client has waived it.

The Court: Well, shall we have a continuance for that purpose?

Mr. Roof: May I consult with my client?

The Court: Yes.

Mr. Roof: Will the Court bear with us for just one moment further, please.

The Court: Yes. I agree with Mr. Knight in this respect that if the trustee had been able to prove that at the time of the filing of the bankruptcy he was attorney for the bankrupt, I think then this Court would have some jurisdiction in making him account for anything he received on behalf of the bankrupt corporation. I think that is the point you were trying to make.

Mr. Knight: Yes, sir.

Mr. Roof: If the Court please, can we strike that question and ask two or three other questions?

The Court: All right.

Q. By Mr. Roof: Mr. Metheany, did you aid in the preparation of the schedules in bankruptcy filed in this matter?

A. No. Let me qualify that. I was requested to provide information concerning creditors. In that respect, I, as attorney for the Sandovals, may, by one interpretation, have been said to have aided in the preparation of the schedules.

Q. Did you refer the corporation to Mr. Bergman for the preparation of schedules?

A. I don't recall whether—I advised any officer of the corporation whether he was a good attorney, is that what you mean?

Q. Specifically what I meant was:

Did you have anything to do with the arrangements whereby the managing officers went to Mr. Bergman for the filing of the petition in this matter?

A. I may very well have advised them or told them that he was a competent attorney. I feel that he is.

Q. Mr. Metheany, do you recall writing a letter on May 27th, 1960, to Mr. Sandoval, in Gardena, California, wherein you set forth disbursements of certain funds for and on behalf of Quality Upholstery?

A. I had considerable correspondence with Mr. Sandoval in this matter. If I can see the letter I can tell you whether it is my signature appearing on it.

Q. This is a copy only.

A. Are you going to mark this for identification? Are you going to mark this?

Mr. Roof: Yes.

The Court: Mark it as Trustee's Exhibit 1 for identification.

Mr. Knight: You haven't made an offer of this?

Mr. Roof: No, I haven't offered it in evidence.

The Witness: In answer to your question, I must again invoke the attorney-client privilege and respectfully decline to answer that question on the ground that anything concerning this transaction is the privilege extended to me by my clients, Albert Sandoval and his father, Ignacio Sandoval, and there has been no express waiver of this privilege on their behalf or by them, and in fact they have expressly requested that I do not divulge any matters concerning this transaction and that it be considered a confidential matter.

Q. Would you deny sending that letter, the original of that letter, to him?

A. Again, I must respectfully decline to answer on the same ground and for the same reason I gave before.

I do not admit or deny writing it, but I must claim the privilege. I am in the position, unfortunately, counsel, that I am an attorney for a client, and while I want in every way possible to help you and the trustee and the bankruptcy court, I cannot be put in a position where I can be liable to disbarment or civil action by my client, who has expressly advised me that this is considered a confidential relationship and a confidential matter, and because of that I must respectfully decline to answer.

Mr. Roof: If the Court please, we have no further questions, unless counsel wants to ask some.

Mr. Knight: I have no questions at this time, your Honor.

The Court: Well, are you desiring a continuation in this matter or—

Mr. Roof: No, your Honor. My client has indicated that there is not a necessity for a continuance.

We would, if the Court please, and if counsel would so stipulate, like to withdraw this from the court records.

Mr. Knight: We will so stipulate.

The Court: All right.

The Witness: May I be excused, your Honor?

The Court: Yes, you may be excused.

I will not rule expressly on the petition at this time;
I will take it under advisement.

That's all.

* * * * *

I, JACK W. KING, do hereby certify that in the foregoing matter the proceedings were taken verbatim by me in shorthand and thereafter, under my direction, the same were transcribed into English context.

I hereby certify that the foregoing pages, numbered from 1 to 21, inclusive, constitute a full, true and accurate transcript of all proceedings had at the aforesaid hearing, done to the best of my skill and ability.

Witness my hand this 13th day of April, 1962.

Court Reporter

Appendix No. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

 UNITED STATES OF
AMERICA,

Plaintiff,

v.

JOHN A. METHEANY,

Defendant.

NO. C-16393-Phx.

 DEFENDANT'S REQUESTED
INSTRUCTION NO. 3

You are further instructed that before you may conclude that the crime of giving a false oath has been committed, it must be determined what the words meant to the defendant at the time he offered them as his testimony and then conclude that the defendant did not at that time believe in the truth of such testimony according to the meaning he ascribed to the words and phrases he used. It does not make any difference whether the statements were true or false. The defendant's belief as to their truth or falsity is the issue.

U.S. v. Lattimore, 127 F.Supp. 405 (U.S.D.C. 1955)

GIVEN.....

REFUSED.....

MODIFIED.....

Withdrawn

No. 22026

In the
United States Court of Appeals
For the Ninth Circuit

JOHN A. METHEANY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court
for the District of Arizona

Reply Brief for Appellant

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No. 22026

In the
United States Court of Appeals
For the Ninth Circuit

JOHN A. METHEANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

Reply Brief for Appellant

**REPLY TO APPELLEE'S ARGUMENT THAT IT WAS NOT IN
ERROR TO ADMIT EVIDENCE ON THE CONCEALMENT
COUNT WHICH WAS EXACTLY THE SAME EVIDENCE AS
THAT INTRODUCED AT THE PRIOR TRIAL WHERE THERE
WAS A JUDGMENT OF ACQUITTAL.**

The government concedes on page 7 of its brief that the government admitted evidence of the appellant's handling of the funds entrusted to him by Sandoval. It is interesting to observe that over half of the government's oral testimony and approximately three-quarters of the exhibits admitted into evidence went to the concealment of assets

count of which the appellant had already been found not guilty. The government's position on this was that the concealment of assets evidence was introduced to show motive for the appellant's alleged perjury or false oaths. This was the government's position as stated on page 12 of the transcript of record. Appellant's counsel at the time of trial immediately objected to this evidence and requested a continuing line of objection (Tr. Vol. 1, pages 12-13).

Although the concealment count and the false oath counts grew out of the same bankruptcy, they did not grow out of the same transaction. The evidence of the concealment of funds was not an essential element of the crime. It had nothing to do with the crime whatsoever. However, the government contends that that is the reason the false statements were given. Therefore, it was not essential to the government's case to introduce evidence of the crime of concealment for which the appellant had already been acquitted, but, rather, we make the forthright assertion to the Court that this prejudiced the jury. An additional fact, which would be humorous if not for its tragic consequences, is that government Exhibit 38 (which was the most damaging exhibit against the defendant) went to the concealment count and was an exhibit apparently not found but certainly not used by the government in the previous trials for concealment.

Unlike *Hernandez v. United States*, 370 F. 2d 171, the concealment was not necessary to prove in order to show the perjury. All that is necessary to show perjury is that the answers were not true. None of the evidence of concealment was used to show the answers were not true, but, rather, the government used it purely as motive. This they were not allowed to do on the grounds of the offense being prohibited to be used by reason of collateral estoppel and

res judicata. If we were less than clear initially, it behooves us to restate our position as to res judicata and collateral estoppel along with the natural prejudice of evidence of another crime. Res judicata applies in criminal cases as well as civil cases, and an exhaustive examination of the recent cases in this area is found at 9 ALR 3d 203. The exact same issues, which were litigated and resulted in a judgment of acquittal at the first trial, were relitigated at the second trial and forced the defendant to once again defend himself against charges of which he had already been acquitted. This is particularly true on the cross-examination of the defendant-appellant (see pages 289-306 of Vol. 2 of the Transcript of Record, especially at pages 291 and 295).

The key issue in the first trial was whether or not the defendant received sums of money as represented by the two checks (government's Exhibits 10A and 10B). The jury must have found that he did not because they acquitted him of concealment of funds. These checks were made out to nonexistent corporations. The government introduced this exact, same evidence at the trial for which the verdict is now being appealed.

In addition, the government introduced Exhibit 38, which showed that the defendant-appellant borrowed funds from Graff in order to pay Sandoval the \$1285.80 which represented the total of the two checks after the F. B. I. stepped into the case. In response to Appellant Metheany's claim of reversible error committed by the trial court in admitting evidence implicating him in alleged concealment of assets in bankruptcy, the government relies solely on the theory that the evidence was admissible, for negating the possibly innocent focus of the defendant, and as proving the defendant's motive for perjuring himself. For the proposition that the evidence was properly admitted, the government relies upon

Schwartz v. United States, 160 F.2d 718 (C.A. 9, 1947), *Reed v. United States*, 364 F.2d 630 (C.A. 9, 1966). Neither case is in point.

In the *Reed* case, the defendants were charged with interstate transportation of kidnapped persons. At the trial, evidence was adduced tending to show that the defendants had been involved, immediately preceding the crime upon which they stood trial, of an armed robbery. With respect to the armed robbery, there is no indication that these defendants were ever charged or tried for armed robbery. In the instant case, the defendant was not only indicted for concealing the assets of a bankrupt, but he was acquitted of that charge by the jury. The Appellant Metheany believes this distinction to be vital. The fact that a duly impaneled jury, after having heard all of the evidence, has found the defendant not guilty of having concealed the assets brings the doctrine of collateral estoppel into play. This theory was unavailable to the defendant Reed; and, as Appellant Metheany pointed out in his opening brief, *Reed v. United States* is inapplicable to the instant appeal.

The second case relied upon by the government is *Schwartz v. United States*, *supra*. In *Schwartz*, two separate indictments were returned against the defendant, charging separate robberies on March 31, 1945, and April 22, 1945. The first of these two charges to go to trial was the robbery which allegedly took place in April of 1945. At that trial, evidence implicating the defendant in the robbery which allegedly took place in March of 1945 was admitted. On appeal, the defendant claimed that the admission of this testimony into evidence was prejudicially erroneous. The Court of Appeals affirmed the judgment of the District Court on the theory that the evidence was corroborative of the testimony of an accomplice and that it tended to show a

common-plan scheme or design. The *Schwartz* case is distinguishable on the following bases:

1. The evidence which was introduced at the trial court did not show, nor was it intended to show, motive of the defendants.

2. Schwartz was indicted for crimes which were identical except as to date and time.

3. The defendant's attack on appeal was based upon the misconduct of the prosecutor, and the Court found that the defendant had failed to complain of such misconduct in the trial court.

4. Most importantly, the second indictment in the *Schwartz* case was dismissed while in the instant case the defendant was found not guilty by jury after trial.

As additional authority for appellant's proposition that evidence relevant to the crime of concealment, of which the defendant was acquitted, was improperly admitted in the defendant's perjury trial, appellant cites the cases of *United States v. Kramer*, 289 F.2d 909 (C.A. 2, 1961), and *United States v. DeAngelo*, 138 F.2d 466 (C.A. 3, 1943). In the *Kramer* case, the defendant was charged and found not guilty of robbery.

In *United States v. Kramer*, *supra*, the defendant was originally indicted for the offense of burglary. The trial on this indictment resulted in a judgment of acquittal. Thereafter, the defendant was indicted for conspiracy to commit the aforementioned burglaries. During the trial on the conspiracy indictment, the government elicited, for the second time, testimonial evidence of an alleged co-conspirator implicating Kramer. The defense reasonably objected to the introduction of this evidence. The trial court overruled these objections and admitted the evidence. The failure of the District Court to exclude this testimony formed the thrust

of defendant's appeal. We are thus presented with a decision of the Court of Appeals, 2 Cir., based upon identical critical facts.

The precise language of *United States v. Kramer, supra*, is so dispositive of the instant case as to require the lengthy quotation which follows :

"Appellant's alternative contention rests on that important principle of law of judgments, unhappily dubbed 'collateral estoppel,' which 'operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action.' It is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain. *Coffey v. United States*, 1886, 116 U. S. 436, 442-443, 6 S. Ct. 437, 29 L. Ed. 684 [criminal judgment applied as collateral estoppel in civil case]; *United States v. Oppenheimer*, 1916, 242 U.S. 85, 87, 37 S. Ct. 68, 61 L. Ed 167; *United States v. Adams*, 1930, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807; *Sealfon v. United States*, 1948, 332 U. S. 575, 578, 68 S. Ct. 237, 92 L. Ed. 180; *Hoag v. State of New Jersey*, 356 U. S. 464, 470-471, 78 S. Ct. 829, 2 L. Ed. 913."

In *Sealfon v. United States*, 332 U. S. 575, 68 S. Ct. 237, 92 L. Ed. 180, at 332 U. S. at page 578, the Supreme Court upheld the doctrine of *res judicata* in criminal cases where it said

"But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States v. Oppenheimer*, 242

U. S. 85, 87; *United States v. De Angelo*, 138 F. 2d 466, 468; 147 A. L. R. 991; see *Frank v. Mangum*, 237 U. S. 309, 334) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See *United States v. Adams*, 281 U. S. 202, 205."

The *Kramer* case, *supra*, went on to say:

"A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue." 289 F. 2d at page 916.

"More important, to permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614,—and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in *Abbate v. United States*, 1959, 359 U. S. 187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729. The very nub of collateral estoppel is to extend *res judicata* beyond those cases where the prior judgment is a complete bar." 289 F. 2d at 919.

United States v. De Angelo, 138 F. 2d 466, is strikingly similar to the *Kramer* case referred to above. Here again, the defendant was originally charged and then acquitted of the substantive offense of robbery and was subsequently indicted for conspiracy to commit robbery. "The question

thus presented is whether the government is estopped from relitigating in a criminal trial facts theretofore materially in issue at a former trial between the same parties for a different criminal offense which resulted in a verdict of acquittal." 138 F. 2d at 468. The Court held "the conclusiveness of a fact which has been competently adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. Cf. *United States v. Adams*, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807." 138 F. 2d at 468.

It is appellant's view of the instant case that he has been convicted of perjury by the use of evidence which showed that he allegedly was involved in the concealment of the assets of a bankrupt, a charge of which the defendant was acquitted. The appellant is unable to see how the introduction into evidence of two checks, purporting to show that the defendant received and therefore concealed certain assets of a bankrupt, which checks were received into evidence at his previous trial where he was acquitted, can be permitted to demonstrate the defendant's motive for perjury to any jury. Such evidence not only is in violation of the doctrine of collateral estoppel but it absolutely precluded the defendant from obtaining his fundamental right to a fair trial. Appellant, therefore, again urges that a judgment of acquittal be entered or, alternatively, a new trial granted.

Respectfully submitted,

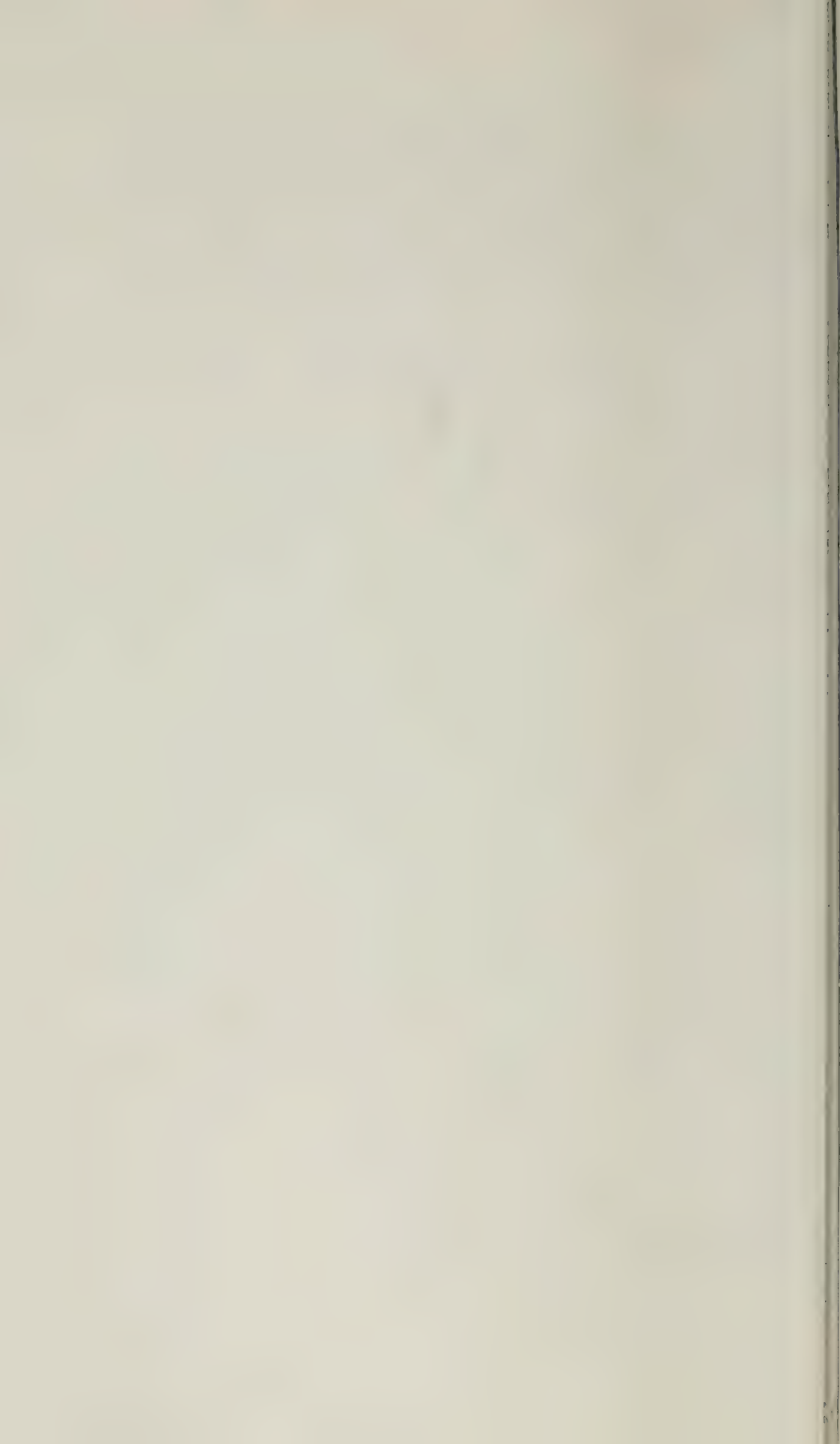
SHELDON GREEN

Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with these rules.

SHELDON GREEN



1 SHELDON GREEN
2 201 E. Earll Drive
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4 264-7596

REC'D
MAR 1
WM. B. LU

5
6
7
8 UNITED STATES COURT OF APPEALS
9 FOR THE NINTH CIRCUT

10 JOHN A. METHENY,

11 Appellant.

NO. 22, 026

12 vs.

PETITION FOR HE

13 UNITED STATES,

14 Respondent.
15 _____/

16 Now comes the appellant and petitions the court for rehear
17 matter on the following grounds:

18 The Court did not pass on the issue of whether or not the
19 collateral estopple applies in criminal cases, further, the co
20 on the issue of whether or not the doctrine of collateral esto
21 in this case. The opinion of the court is directly contrary t
22 spirit of US vs Kramer (1961) 289 Fed 2 902, 2d cir.

23 Sheldon Green by
24 SHELDON GREEN

25 Now comes Jerome Berg and first being sworn says: I am a
26 United States, over 18 years of age, employed in San Franc
and not a party to this action; I served a true copy of the for

by mail by placing it in an envelope, which envelope was sealed, carried
fully prepaid postage, was deposited in the U.S. Mail at San Francisco,
California on March 15, 1968, and was addressed as follows:

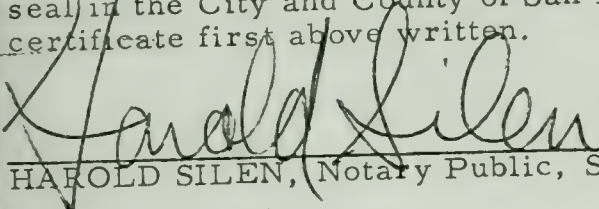
US Attorney, Cecil Pool
Federal Building
San Francisco, California.

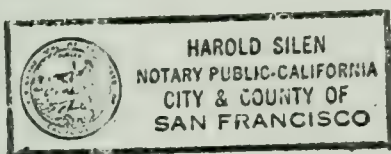

JEROME BERG

STATE OF CALIFORNIA,)
City and County of San Francisco) ss.

On this 15th day of March, in the year 1968 before me, Harold Silen, a
Notary Public, State of California, duly commissioned and sworn, personally
appeared JEROME BERG known to me to be the person whose name is subscri-
bed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official
seal in the City and County of San Francisco, the day and year in this
certificate first above written.


HAROLD SILEN, Notary Public, State of California



My Commission Expires August 19, 1970

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ALBERT CURRY,

Appellant,

vs.

NO. 22030 ✓

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellee.

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FILED

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ALBERT CURRY,

Appellant,

vs.

NO. 22030

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellee.

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in this Court when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California, dated June 2, 1967, in the proceeding entitled Curry v. Wilson, No. 45068. The order is officially reported at 269 F. Supp. 9 (N. D. Cal. 1967).

A. Proceedings in the state trial court.

By indictment, appellant was accused by the Grand Jury of Orange County, California, of a violation of section 187 of the California Penal Code in that on October 6, 1959, he did wilfully, unlawfully and feloniously, with malice aforethought, murder police officer Myron Trapp (CT 3).^{*} Appellant was tried before a jury in 1960 (CT 3).

The prosecution demanded a conviction of first degree murder (RT 1102-1104). The defense theory was that appellant was intoxicated at the time of the killing and that there was no deliberate, premeditated and intentional taking of a human life (RT 51, 1127-1130). The jury, after fourteen days of trial, returned a verdict of second degree murder (CT 112).

The following facts were developed at the trial, the transcript of which was lodged in the District Court:

^{*}CT refers to Clerk's Transcript of appellant's appeal in the state court; RT refers to Reporter's Transcript of the appeal in the state court; CTA will refer to the Clerk's Transcript of the appeal in this Court.

PROSECUTION:

At about 2:55 p.m. on October 6, 1959, Sergeants Kenneth J. Runyon and Myron Trapp were at the Garden Grove Police Department (RT 52). A call was received concerning a man in a house with a gun (RT 72). The two police officers drove to a residence on Nelson Street in Garden Grove (RT 53). As they arrived at the location, Sergeant Runyon removed the automatic shotgun from the locked dash of the squad car. Sergeant Trapp parked in front of the next building south of the residence. An apartment house was under construction there (RT 54). Fifteen or twenty persons were in the street. Two uniformed officers were at the rear of the apartment building (RT 55). Sergeant Trapp used the public address system on the car to talk to the occupant of the house (RT 57). He said, "You in the white house, the house is surrounded. We are police officers. Come out" (RT 58:6-8). He then gave a count-down of ten to give the occupant time to come out. Sergeants Trapp and Runyon approached the house from the gate, up the driveway, crouching low, trying to minimize the size of the target (RT 58-59). Sergeant Runyon went to the northeast corner of the house at the front porch, while Trapp arrived at the north side of the house at the kitchen door, beyond range of Runyon's vision (RT 59). Runyon heard a commotion at the kitchen door (RT 60). Sergeant

Jacobs had also approached that door (RT 168). Trapp knocked and yelled, "We are police officers." He said, "Come out of the premises unarmed with your hands up" (RT 169: 17-19). They beat on the house one more time and pushed the door open (RT 169). Sergeant Jacobs saw the appellant seated on the couch with a rifle on his lap. Appellant raised the rifle up to his shoulder and pointed it at Jacobs who was dressed in full uniform. The sergeant yelled (RT 170, 197). He suggested that Trapp hold on the corner while he called for assistance and for tear gas (RT 171). Runyon saw Trapp come from the kitchen door in a wide arc to the rear of him, around the sidewalk. Trapp yelled to Runyon to get away from the door, as the man was approaching it (RT 60). The sharp report of a rifle was heard next, accompanied by the tinkling of glass breaking. Trapp dropped his gun and walked across the yard, as if he had been hit (RT 62). He walked across the lawn, half on his knees and half on his feet, for six feet or so before he fell flat on the ground (RT 63). Trapp yelled that he had been hit. Runyon looked toward the house and saw a shadow through the kitchen window; he shot twice (RT 64).

One officer climbed in a window and saw the appellant standing in the doorway of the bedroom. He had a rifle in hand, pointing downwards. The policeman said, "I am a police officer. Drop the gun" (RT 298:2-3).

Appellant pulled the gun up and fired. The officer felt a sharp sting in his left hand and went backward out the window (RT 297-299).

Officer Roach fired some shots into the rear of the house (RT 66). A voice yelled from inside, "Don't shoot, don't kill me, I surrender" (RT 175:14-15). Appellant came out, his hands up straight over his head (RT 175). Again he asked not to be shot (RT 176). Jacobs said, "Keep your hands high over your head. Walk very slowly onto the porch" (RT 177:2-3). And he did. Appellant came into the open. The officers took him into custody (RT 177-178). Appellant had some blood on his forehead (RT 69, 139).

An autopsy was performed on the victim (RT 245). A bullet passing through the body had caused death (RT 262).

Alijandro R. Alcala, a cement mason, was working next door to appellant's home on October 6, 1959 (RT 333). At 2:00 p.m., while he was working on an apartment building, he heard a shot and saw some plaster by his right leg (RT 336). He saw a hole in the wall, three feet off the ground and four feet from him (RT 337). While he showed this to a coworker, he heard a second shot, 10 inches from the first one (RT 338). The police arrived five to seven minutes later (RT 34, 341, 411).

After the homicide, the house was entered to see if anyone else was there (RT 457). No one was found inside (RT 458).

When appellant was put in the car he was heard to say, " I know what I have done and I am sorry" (RT 459:21).

On the ride to the police station appellant kept repeating: "I didn't mean to kill that police officer, honestly, believe me, I know what I have done, but I had no intention of doing it. I know what will happen to me, I'm done" (RT 536).

About 3:30 p.m. the Garden Grove Chief of Police talked to the appellant (RT 474). The chief went to a cell and asked appellant if he was the man who shot the officer. Appellant said, "No, I shot at some construction workers who were dumping trash on my yard" (RT 474:22-23). Appellant was taken to another room where there was further conversation, recorded on tape (RT 475). Appellant had very definitely been drinking. He was intoxicated but not drunk (RT 476). In the tape appellant said he just wanted to scare the construction workers (RT 486). He said he just shot in the air. He was sorry he did it and, "If I am wrong I want to pay . . . full penalty" (RT 492). The full tape is reported at pages 481-494 of the Reporter's Transcript, and much of it contains assertions of faulty recollection and

expressions of persecution by the world generally.

Appellant was interrogated by Deputy Sheriff John R. Baker and Sergeant Rios at 7:30 or 7:45 p.m. that day. Appellant was interviewed for four and one-half hours. No threats or promises were made (RT 201/c). What he said was free and voluntary. At the outset of the interview appellant made the following remarks:

"Mr. Curry said that he left for work about 7:00 a.m. on the 6th; he was picked up by his foreman, Mr. Arnold, and taken to a roofing job; on the way to the roofing job Mr. Curry said that they stopped and bought a fifth of Gallo Wine, and upon arriving at the roofing job they learned that the inspectors had not been out to inspect the job; therefore the roofing job was delayed, and that while they were on the job that he and Webb drank this fifth of wine, or he and Arnold, pardon me. They remained there until about 10:00 a.m. that morning and decided to go back to Curry's house. On the way back they again stopped and Curry said that he had bought another bottle of port wine. At this time there was a third party, a Mr. Webb with them, and when they arrived at Curry's house, shortly after Webb wanted to go home and Mr. Curry said that he and Mr. Arnold then drove him to his home and returned. They were only gone a short time. They drank this fifth that they bought on the way back to the house, and about 12:00 o'clock Mr. Curry said that he heated up four tamales and that he ate two and also Arnold ate the other two. Then he said that Arnold left about 2:00 o'clock and from that point on Mr. Curry said he could not recall what happened" (RT 201/d, line 23; p. 201/e, line 18).

During this subsequent interview, appellant's recollection improved (RT 201/f). He said:

"As we talked to Mr. Curry he then -- he then said he recalled going to his bedroom to the closet and taking a .22 rifle from the closet. Mr. Curry then said he went to his dresser drawer and removed about eight or ten shells and loaded this .22 rifle. At this time Mr. Curry stated that he had trouble with the workmen building the apartment on the adjoining property; that the workmen were scattering scrap building material and pieces over the property line onto Mr. Curry's property. And at this time Mr. Curry said he fired two shots out of the bedroom window at the workmen. He stated he didn't intend to hit them but, more or less, to scare them. Then he said -- Mr. Curry said he put the rifle on the bed, went back to the living room and watched the World Series baseball game; shortly after this he heard several voices outside around his house, and at this time he went back to the bedroom, picked up the rifle and brought it into the living room and sat on the davenport.

"Mr. Curry said that following these voices he saw a figure through his glass front door of a person on the front porch; at this time, he said, he lifted the rifle up and fired at this figure.

"We then asked -- Sergeant Rios then asked Mr. Curry if he recalled the events that followed this, and Mr. Curry stated that he could not recall" (RT 202:1-24).

A tape was made of the last part of the interview (RT 208).

A rifle was found on the floor of the living room (RT 549). A wine bottle was under the coffee table (RT 550). Three empty wine bottles were in the kitchen waste paper basket (RT 563). In the bedroom another rifle lay on the foot of one of the beds (RT 551). It was loaded (RT 552) as was the first (RT 554).

The mechanics for loading both weapons are essentially the same (RT 555). The procedure was explained as follows:

"A The gun is designed to be loaded through the magazine by removing the magazine follower rod far enough to allow the opening in the middle section of the magazine to be exposed, into which the shells are dropped base toward the receiver. The magazine is filled, the follower rod is then reinserted and locked into place.

"Q And what are the mechanics of getting a shell into the chamber, then?

"A In order to feed a shell from the magazine into the chamber the forestock, which is the grip under the barrel of the gun, has to be moved to the rear, which opens the action and allows the shell to be placed in position so that when the forestock or pump is returned, that shell is fed into the chamber of the rifle" (RT 552, 553).

Two empty shells and one live shell were found on the bedroom floor (RT 558-559). In the living room two shell casings were found (RT 560).

The bullet found in the victim's body was identified as a 22 Winchester Rimfire bullet (RT 565). Appellant's weapon was of the same make (RT 554).

The murder bullet was compared ballistically with the weapon in the house. The expert testified: "While the gross characteristics of the bullets were similar I was unable to find sufficient individual characteristics present to say that the bullet was fired from that weapon" (RT 574). There were several factors

that inhibited positive identification (RT 575). The casings on the floor, however, were fired through the weapon (RT 577). The weapon had been fired since it was last cleaned, but not the one in the bedroom (RT 580). The police attempted also to reconstruct the trajectory of the bullet fired at Sergeant Trapp. They examined defects in the screen, curtain and glass door. They inserted a probe through them and photographed the result establishing a line running from the inside to the outside of the house (RT 605).

Much evidence was introduced on both sides as to the levels of intoxication by blood alcohol. The generally accepted figure for unsafely driving a car is .15. There is a distinction between this "under the influence" level and the level of intoxication. The low figure on intoxication is .25 and it runs to .28. (RT 627). The point at which a person will pass out runs from 3.5 to 4.2 (RT 628). [What is probably meant here is .35 to .42]. Appellant's blood alcohol was taken just prior to 5:05 p.m. (RT 624, 668). At this time appellant's face was red and bloated and his breath smelled of alcohol (RT 629). Of persons between .25 and .30 some are confused on time and place. Many are lucid. Most of them know what they have been doing (RT 630-631). Individuals with a drinking history develop a tolerance. A person without this tolerance may appear to be in worse

condition (RT 632, 672-673). Reason and judgment may be impaired between .25 and .30 (RT 633).

The test specimen taken at 5:05 p.m., had .257 percent blood alcohol (RT 668). At 1:48 the next morning the level had receded to .094 percent (RT 669).

To determine appellant's blood alcohol level at 3:00 p.m., the time of the killing, there are three possibilities. It could have been greater at 3:00 p.m. if the alcohol level in his system decreased. Or it could have remained the same. Or it could have been lower if the alcohol were consumed just before 3:00 p.m. so that it had not yet been absorbed into his system at the time of the killing (RT 674-676).

Fourteen ounces of one-hundred-proof whiskey would be needed to produce a level of .257 in a two-hundred-pound man (RT 676).

At .25 percent you would expect to find staggering; his manner of speech would be affected. The memory loss would probably increase (RT 690). Wine would have a slower ingestion rate than whiskey (RT 691). A person with a .25 or .28 would be able to load and fire a rifle. He would know he had a lethal weapon (RT 692).

DEFENSE:

According to his wife, appellant had been drinking for a year and a half. For two years before that he didn't drink at all (RT 707). He started drinking

again when he began to work with Jake Arnold, his foreman (RT 708). He drank quite a bit in the few days preceding the homicide (RT 708). He was not a quarrelsome person when drunk. The workmen next door had sprayed plaster on his mother-in-law but appellant had said nothing about it to them. They threw things on the porch and ruined a new chaise-lounge. Appellant just said to move it over (RT 712-713). He had a perfect reputation for peace and quiet (RT 719). She had heard however that he had been previously convicted of burglary and that his parole had been violated. She also had heard of another prior burglary conviction (RT 728-729).

Jake Arnold picked appellant up for work that morning. They had part of a bottle of wine at that time (RT 724). They got out to the job but were not permitted to work, as the job had not been inspected (RT 746). On the way they stopped and bought another bottle of wine (RT 747). They went back to the shop and drank (RT 748). They bought more alcohol and went to the appellant's house and drank, ate a tamale, talked and sat (RT 750, 751 752). Arnold arrived home at 2:00 p.m. and it took 20 or 25 minutes to go from appellant's house to his home (RT 764-5).

Appellant was examined by a doctor at 4:40 p.m. on October 6, 1959. There was a strong odor of alcohol; he swayed when seated (RT 785). However he had walked

in by himself, hands cuffed behind his back (RT 789).

Appellant testified on his own behalf. He related the drinking he had done. He couldn't "give a close estimate" but left the impression that it was a considerable amount. He ate "maybe two tamales" (RT 863-865). He had a "faint something there" as to shooting out the back window but not a clear picture. He did not recall loading guns. He vividly remembered drinking with Jake Arnold but recalled hearing no shots, not even those the police fired into the house. After sitting with Jake Arnold, his next recollection was of being in the District Attorney's office (RT 867). This was the Baker-Rios interrogation. He did not recall shooting out the front door (RT 867-868).

As to his taped admissions, he accounted for them this way:

"A Well, after all, this being told repeatedly over and over and over -- I mean they placed me in the house, and so, I must have done it, I mean that is the answer I arrived at, I must have done it if I am the only one in the house. I am told that I done it, so that is -- that is the only knowledge I have of the incident" (RT 872).

He said Baker and Rios never hit him. "What did they do?" "Talked." (RT 874).

Appellant called to the stand an expert witness, a psychiatrist who had experience with alcoholics (RT 935). The prosecution had arranged to have him examine the

appellant for sanity (RT 938). The doctor determined there was legal sanity (RT 940). He spoke to him for an hour and a half to two hours (RT 943). The psychiatrist felt that appellant was not lying about his memory lapses:

"A We believe in our work that if a person will cooperate and answer our questions, that we can tell if one is malingering or not, or lying, whatever you wish to say. If they answer all our questions. We can ask the same question from a psychological standpoint in many different ways, and we get our same conclusion. And I believe if anyone will answer us other than 'Yes' and 'No' and will give us an explanation the best they can, I don't believe it is possible to falsify about that. I don't think he was falsifying about his memory. Everything added up to it. He didn't try to lie to me in anything that I could find. I believe that he definitely had a memory loss." (RT 946-947).

The doctor wondered if even what appellant did remember was not put there by suggestion. He did not feel that appellant had the mental capacity to form malice aforethought (RT 957). The doctor knew what malice aforethought was because he had just looked up the term (RT 954). Nor did he feel appellant could have premeditated or deliberated (RT 957-58). The doctor elaborated:

". . . I think, if -- no matter who he shot or what it was, it could have been the King of England and I don't think he had any malice, he is able to have, had no forethought. He didn't plan it. I don't think the intent was there. All the testimony -- or, rather, the interrogation shows that he had very little memory, that he was not mad at everybody

--anybody, except maybe he was irritated at noise ; he was drunk, shot at the workman, maybe. . . ." (RT 958).

On cross-examination, however, the doctor said that appellant would have known he had a gun (RT 963). He did a lot of normal things -- he didn't resist or hide; he knew he was watching a ballgame. He got the gun from a closet and loaded it (RT 965). He might know he was firing the gun (RT 975). He would not be able to deceive (RT 994). He would be shooting at something that irritated him (RT 997). He fired at noise, pounding on the door (RT 999).

REBUTTAL:

Nathaniel Showstack was qualified as a psychiatrist, Director of Clinical Services at the California Medical Facility, a psychiatric prison hospital for the Department of Corrections (RT 1044). He had engaged extensively in the treatment of alcoholics (RT 1045). A person in the condition described would know he had a gun and would know it was a lethal weapon (RT 1048). The doctor concluded that appellant was able to reason under the influence of alcohol, with some impairment from the high alcoholic content of the blood (RT 1049).

"A Well, when he shot at the Mexican workers next door, he said he didn't mean to kill them, he just wanted to scare them. Even though his reasoning may have been impaired by the alcohol, he seemed to know what he was doing. And then when he said that he was sorry that he killed the police

Officer Trapp, who ultimately became the victim, used the loudspeaker of the police car public address system, several times calling to defendant that they were officers that the house was surrounded, and for defendant to come out. Upon defendant's failure to appear, officer Trapp knocked on defendant's rear door, and again announced in a loud voice that they were officers and for defendant to come out unarmed. Officer Jacobs, in uniform, opened the rear door. Defendant, sitting on a couch with a rifle on his lap, raised his rifle and pointed it at Jacobs. Jacobs left the door, and Trapp moved in a wide arc towards the front of the house. Officer Runyon was standing near the front door. As Trapp came into view in the front yard, defendant fired and killed Trapp. Again one of the officers called for defendant to come out with his hands up, that an officer had been hit.

"Officer Roach then attempted to enter a window in the rear bedroom, calling to defendant: 'I am a police officer. Drop the gun.' Roach was in uniform. Defendant again fired the rifle. Roach felt a sting in his left hand, but whether it was struck by a bullet or by flying glass is not made clear by the record. Several shots were fired by the officers. Defendant then called, 'Don't shoot, don't kill me, I surrender.' He came to the screen door with his hands up, repeating the same or similar words. He was then again ordered to come out slowly, and he complied. Defendant was placed under arrest, the house was immediately searched, and defendant was found to be the sole occupant. Two rifles, partly loaded, and several expended shells were found on the floor.

"In the police car on the way to the police station, defendant said, 'I know what I have done and I am sorry.' He also repeated over and over 'I didn't mean to kill that police officer, honestly, believe, I know what I have done, but I had no intentions of doing it. I know what will happen to me, I'm done.' Later he stated he was shooting at some construction workers who were dumping

trash in his yard. Still later, defendant was interrogated at length and at the close of the interrogation, a tape recording was made of questions and answers purporting to amount to a summation of the facts developed by the interrogation. On stipulation of both counsel, this tape recording and a transcription thereof were placed in evidence. A second tape recording of another interrogation was also placed in evidence on stipulation of both counsel.

"The chief defense was a claim of intoxication to the extent of inability to form intent. There is little doubt that defendant had, in fact, imbibed considerable intoxicating liquor. However, the evidence as to the extent of his intoxication and his understanding of what he was doing is in substantial conflict." 192 Cal.App.2d, at 668-669.

Among the issues raised on appeal was the contention that it was error to admit into evidence the two tape recordings and other evidence of his statements to the police during interrogation, because they were not voluntary statements but statements made while appellant was intoxicated. The appellate court found:

"That defendant may have been partially intoxicated did not make his statements inadmissible nor destroy their voluntary character. (People v. Dorman, 28 Cal.2d 846, 854 [6] [172 P.2d 686]; People v. Byrd, 42 Cal.2d 200, 211 [11] [166 P.2d 505].) Whatever truth there may be in the old proverb, 'In vino veritas' the matter of intoxication as presented under the facts in this case here at bar, clearly goes to the weight of the testimony and not to admissibility. (74 A.L.R. 1102; People v. Farrington, 140 Cal. 656, 661 [74 P.288].)" 192 Cal.App.2d at 670.

The appellate court also found that there was no overreaching on the part of the authorities. Moreover, it noted that there not only was no objection

to the recordings but that they were actually introduced on stipulation of both counsel. The police officers were not required to close their ears to the volunteered statements of an intoxicated man.

C. State habeas corpus proceedings

Appellant filed a petition for a writ of habeas corpus in the California Supreme Court on July 23, 1965, over four years after his conviction was affirmed by the California Court of Appeal. Again appellant urged that his statements were inadmissible by reason of his intoxication. The petition was denied without opinion on August 18, 1965. In re Curry, Crim. No. 9215.

D. The first federal habeas corpus proceeding

On August 30, 1965, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The petition was entertained by the Honorable George B. Harris and the proceeding was designated Curry v. Wilson, No. 44066. An order to show cause was issued and a return thereto was duly filed by the California Attorney General, representing the warden of the state prison. Appellant was represented by retained counsel, Arnold H. Mintz (CTA 38). * The trial record was

* Clerk's Transcript of the appeal in this Court.

lodged with the District Court.

Appellant again alleged that his pretrial statements were inadmissible by reason of his intoxication. The District Court not only found that appellant was barred from attacking the admissibility of the statements because he deliberately bypassed California's contemporaneous objection rule, but also found that appellant's partial intoxication did not make his statements inadmissible nor destroy their voluntary character. The District Court cited also Brown v. Allen, 344 U.S. 443, 457-458 (1953):

"The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed. Mooney v Holohan, 294 U.S. 103; Ex parte Hawk, 321 U.S. 114. Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue. Malinske v. New York, 324 U.S. 401, 404. In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional

issues. It is not res judicata (footnote omitted)"

With the trial court record before it, the District Court specifically concurred in the California appellate court's findings that the statements were admissible and that appellant had not been denied due process of law (CTA 49-50). Appellant did not appeal the District Court's order to this Court.

E. Second federal habeas corpus proceeding

On May 5, 1966, appellant filed a second habeas corpus application in the District Court (CTA 1-35). The petition was entertained by the Honorable Alfonso J. Zirpoli, who issued an order to show cause on November 1, 1966 (CTA 36). A return was filed by appellee on December 14, 1966 (CTA 37-50). A traverse was filed by appellant's appointed counsel on February 28, 1967 (CTA 51-63). After some two hours of oral argument held on March 8, 1967, the District Court took the matter under submission.

On June 2, 1967, the District Court found that the petition raised the following issues:

1. Was appellant's constitutional right to counsel violated when incriminatory statements were taken from him and introduced in evidence at his trial?

2. Were coercive police tactics used to obtain the statements rendering the statements involuntary?



3. Did appellant's voluntary intoxication render his statements involuntary?

4. Was appellant adequately represented by his trial counsel?

5. Was the trial court constitutionally required to instruct that jury that it must consider (a) appellant's degree of intoxication and (b) the failure to warn him of his constitutional rights, in assessing the voluntariness of these statements?

The District Court found that issues 1 through 3 had been considered in appellant's first federal habeas corpus proceeding, Curry v. Wilson, No. 44066, and that findings adverse to appellant had been made. The Court, pursuant to Title 28, United States Code section 2244, refused to rehear the issues and gave its reasons for so refusing. First, the District Court found that the failure to object to the statements at the time of trial was a deliberate bypassing of California's contemporaneous objection rule; second, the District Court held that the fact of voluntary intoxication goes to the weight to be given the statements and not to their admissibility.

Addressing itself to issues 4 and 5 on the merits, the District Court said that upon review of the 1238-page transcript, it was clear that appellant's trial counsel presented an active defense in a difficult case

and that his performance, by far, was above the level that would shock the conscience and make the proceeding a mockery of justice. On issue 5, the District Court reached the following conclusion:

"[Appellant] relies upon Haynes v. Washington, 373 U.S. 503 (1963), and Unsworth v. Gladden, *supra*, for the proposition that the jury must, as a matter of constitutional due process, be instructed to consider the failure to warn petitioner of his right to remain silent and his right to counsel, and further that his state of voluntary intoxication must be considered with respect to its duty to determine whether or not the statements were voluntary. Haynes does not stand for this proposition at all. The Supreme Court in that case determined on an independent review of the record that the incriminatory statements could not have been voluntary. It is further noteworthy that at the time Haynes was tried, the Washington procedure left the determination of voluntariness entirely to the jury to be determined in a general verdict. This procedure was later ruled unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964). California, on the other hand, follows the 'Massachusetts rule', which requires that the judge make an initial determination of voluntariness, thus adding an additional safeguard. On the facts of this case it is also significant that petitioner's counsel did not object, but in fact stipulated to the use of most of the statements, while in Haynes there was timely objection. Unsworth v. Gladden, *supra*, does contain a dictum to the effect that it would be constitutional error to fail to give a jury an instruction to give less weight to statements which are made under the influence of alcohol. This court is not in accord with that dictum, insofar as it purports to set forth a constitutional mandate and declines to apply it to the facts of this case."

The District Court thereupon concluded that appellant's contentions were without merit and denied

the petition for a writ of habeas corpus (CTA 65-68).

APPELLANT'S SPECIFICATIONS OF ERROR

1. The District Court erred in denying the petition for a writ of habeas corpus.

2. The District Court erred in declining to hold an evidentiary hearing on the matters alleged in the petition for a writ of habeas corpus.

3. The District Court erred in holding that appellant's intoxication had no bearing on the voluntariness of appellant's confessions.

4. The district Court erred in neglecting to consider the failure of the police to advise appellant of his rights as bearing upon the voluntariness of his confessions.

5. The District Court erred in neglecting to consider appellant's injuries and certain other factors tending to weaken appellant's will as bearing upon the voluntariness of his confessions.

6. The District Court erred in failing to find, on the basis of the record, that appellant's confessions were involuntary in fact.

7. The District Court erred in finding that trial counsel's stipulation of appellant's statements into evidence was a "deliberate bypassing" of state procedure.

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6. The District Court erred in failing to find, on the basis of the record, that appellant's confessions were involuntary in fact.

7. The District Court erred in finding that trial counsel's stipulation of appellant's statements into evidence was a "deliberate bypassing" of state procedure.

8. The District Court erred in holding that trial counsel's stipulation of the statements into evidence precluded federal collateral review of the actual voluntariness of the statements.

9. The District Court erred in failing to find that the jury instruction on the issue of voluntariness was erroneous as a matter of constitutional law.

10. The District Court erred in holding that the California procedure for passing upon the voluntariness of confessions insulates California instructions on this issue from federal review.

SUMMARY OF APPELLEE'S ARGUMENT

I. The District Court properly refused to rehear the allegations that appellant's incriminating statements were involuntary by reason of appellant's self-indulgence in alcoholic beverages, and that the use of such statements violated his constitutional rights even though his trial counsel stipulated to their admissibility.

II. The District Court properly held that the trial court, as a matter of due process, was not required on its own motion to instruct the jury to consider (a) appellant's voluntary intoxication, and (b) the failure of this police to advise him of his rights, in determining the voluntariness of his statements.

ARGUMENT

I.

THE DISTRICT COURT JUDGE PROPERLY REFUSED
TO REHEAR ALLEGATIONS PREVIOUSLY HEARD AND
DECIDED BY ANOTHER DISTRICT COURT JUDGE

The District Court Judge refused to entertain appellant's contentions (1) that his constitutional right to counsel was violated when incriminatory statements were taken from him and introduced in evidence at his trial; (2) that these statements were rendered involuntary by virtue of coercive police tactics used to obtain them and that incriminatory statements made by petitioner were rendered involuntary by virtue of his voluntary intoxication; and (3) that it was constitutional error to allow them to be introduced in evidence against him. These contentions had been previously raised and decided against appellant in Curry v. Wilson, No. 44066, decided January 28, 1966.

In deciding not to rehear these issues, the District Court correctly relied upon Title 28, United States Code section 2244, which provides, in pertinent part, as follows:

"(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a state court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent

application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

The District Court had broad discretion to dismiss the habeas corpus application where the grounds advanced for relief had already been determined against appellant on the prior application. Sanders v. United States, 373 U.S. 1, 15-17 (1963); Duncan v. Carter, 299 F.2d 179, 181-182 (9th Cir. 1962), cert. denied 370 U.S. 952 (1962); Jones v. State of Montana, 231 F. Supp. 531 (D.C. Mont. 1964).

Contentions 1 through 3 of appellant's petition were not dismissed without explanation for the District Court explicitly stated the reasons why it believed the ends of justice would not be served by rehearing the contentions. Appellant was represented with great vigor and force on the trial level, yet his experienced counsel, obviously learned in the law, deliberately and consciously abstained from making objections to the admissibility of the statements now alleged to be involuntary. This, the District Court found, was a deliberate bypassing of California's

contemporaneous objection rule. Nelson v. People, 346 F.2d 73, 77-82 (9th Cir. 1965).

No detailed analysis is necessary to understand why trial counsel did not object to the introduction of the extra judicial statements of his client. Appellant's initial statement, made upon his apprehension and while he was being placed in the police car, was: "I know what I have done and I am sorry" (RT 459). On the way to the station appellant said: "I didn't mean to kill that police officer, honestly, believe me, I know what I have done, but I had no intentions of doing it. I know what will happen to me, I'm done" (RT 536). These were the spontaneous, volunteered statements of a man caught in an act of crime and they were made without police questioning or pressure as established by trial counsel's probing cross-examination of the officer who witnessed the statements (RT 537-543). This officer witness did not know appellant was intoxicated (RT 541-542), but even if he had known, there is no requirement that officers arresting a drunk must make themselves deaf like the sailors of Ulysses passing the rocks of the Sirens. Aside from the lack of a legal ground to object, the statements were valuable to the defense, for they reflected appellant's state of mind at the time of the killing. Where the issues were whether appellant killed with premeditation and

deliberation, or whether he even had the intent to kill, the statements were definitely helpful to the defense.

The first tape recording was admitted upon stipulation (RT 476-480). It was not a confession, as appellant incorrectly asserts, but an exculpatory statement (RT 481-494). The tape is replete with accounts of appellant's drinking, assertions of faulty recollection and expression of persecution by the world generally -- factors consistent with the defense theory that appellant was incapable of formulating the intent to kill, or unable to premeditate.

The second tape recording was part of a long interview which commenced some four and one-half hours after the killing (RT 201/c - 208). It traced appellant's activities that day, his drinking and food consumption, his shooting at the construction workers, his firing at a figure through a glass door, and his mental blackout (RT 202-208). Again it was not a confession and was essentially consistent with the case of the defense, including appellant's own testimony (RT 871-885). The tape and the statements given at the interview were admitted without objection. The statements were given freely (RT 201/c - 201/d), a matter explored at length by appellant's trial counsel (RT 203-227).

Consequently, the District Court, in its

discretion, chose not to rehear the contentions that the statements were involuntary, because it was apparent from the record that trial counsel consciously abstained from making an objection to their admission. This was not an oversight. This represented counsel's considered opinion that such a claim was so devoid of merit as to be unworthy of presentation.

The second reason which the District Court gave for not rehearing appellant's contentions was the overwhelming authority contrary to appellant's assertion that his voluntary intoxication made the statements involuntary per se.

At the outset, it must be noted that there is no conflict in the record on the facts that appellant had imbibed a considerable amount of intoxicating beverages. However, the evidence as to the degree of his intoxication and of his comprehension of what he was doing was in substantial conflict at trial. Expert witnesses on the effect of alcohol were presented by both sides (RT 627-692, 935-999, 1044-1065). The resolution of the conflict was for the jury. The jury apparently found that the degree of appellant's intoxication prevented him from premeditating and deliberating but it did not preclude him from formulating the intent to kill. The verdict was a partial defense victory. The skill of defense counsel may have saved appellant's

life, for if the jury had returned a verdict of first degree murder, appellant would have been eligible for the gas chamber.

Appellant treats the issues of intoxication and voluntariness as being inextricably entwined. The law, however, does not so consider them. Where the only objection to admission of a statement is a claim of voluntary intoxication during interrogation, the law is very clear that that factor will not affect admissibility, but will bear only on the weight and credibility to be given to the statement by the jury. Mergner v. United States, 147 F.2d 572 (D.C. Cir. 1945) ^{1/} The only exception to the rule is where the suspect is in a state of delirium, frenzy, incoherence or uncontrollable emotion as a result of the intoxication. Cf. Doyon v. Robbins, 322 F.2d 486, 493 (1st Cir. 1963), cert. denied 376 U.S. 923 (1964). That was not the case here (RT 462, 476).

On his arrest and on the way to the police station, appellant did not appear to be intoxicated (RT 454-470). At the police station appellant appeared intoxicated but not drunk (RT 476). At one point appellant had a .257 blood alcohol level, but the officers, of course, did not know this at the time they talked to

1. See Annotations in 69 A.L.R. 2d 361; 74 A.L.R. 1098.

him. The police officers did nothing wrong in questioning appellant to find out the circumstances under which their brother officer had been killed, even though they were aware appellant had consumed some alcohol.

Appellant cites numerous holdings where the sick, insane, young and the uneducated have been broken by prolonged and coercive interrogation. This is illustrated by Blackburn v. Alabama, 361 U.S. 199 (1960), where an 8-10 hour interrogation cracked an insane person. But intoxication and insanity are not identical. If a "most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane . . .", human emotions are not stirred by the questioning of a lawbreaker under the influence of alcohol. The law has long recognized the distinction between insanity and voluntary intoxication and has given the former a preferred position as a defense to crime. Appellant's claims before the District Court of intoxication amount to contentions that he should be shielded by virtue of his own vice.

Appellant proposes a new general principle of law: any condition of a defendant which deprives him, to a substantial degree, of his powers of will and judgment renders involuntary a confession taken from him by police who choose to take advantage of his

condition to interrogate him. Yet, on its face, this proposed general principle has no application to this case. Here, the evidence as to the degree of intoxication and appellant's understanding of what he was doing was in substantial conflict; here, appellant did not make a confession; here, the officers did not take advantage of his condition, they being specifically unaware of the extent of his intoxication.

Appellant's only incriminatory statement was his admission that he fired at a figure as it passed by the other side of a glass door (RT 202). The officers testified that this admission was not made until 11:00 or 11:30 p.m., some 8 hours after the killing. Appellant's level of intoxication at this time can be computed from the information we have. We know the level was .257 at 5:05 p.m. There is testimony that the average rate of decline is .015 an hour (RT 667). From this, by subtracting .015 every hour, we can make up a table to show the alcohol level at the time the admission was made. (It should be noted that there is no likelihood that the level would increase or remain the same after 5:00 p.m., for it takes 40 to 70 minutes to ingest alcohol into the blood stream (RT 666), and the sample was taken 2 hours after the arrest. We feel it can be assumed appellant was given no intoxicants in this period.)

<u>Time</u>	<u>Blood Alcohol Level</u>
5:05	.257
6:05	.242
7:05	.227
8:05	.212
9:05	.197
10:05	.182
11:05	.167
12:05	.152
1:05	.137
2:05	.122

By our table we can see that the blood alcohol level at that time had reduced itself to an area of .167 to .160, hardly above the level of unsafe driving. Yet even this does not tell the full story, for it appears that appellant's rate of decline was above average. By 1:45 in the morning, by our means of computation, we would expect him to have a blood alcohol reading of .13, yet it was actually .094. We would necessarily have to assume that there was less alcohol in his blood when the admission was forthcoming. By working back from the 1:48 figure, adding to it .015 every hour, we get the following table:

<u>Time</u>	<u>Blood Alcohol Level</u>
1:48	.094
12:48	.109
11:48	.124
10:48	.149

Thus, instead of the level being between .167 to .160, it may have been down to .13 or .14, and very probably was below the .15 of being under the influence, because we are closer in time to the .094 at the close of the interview than to the 5:00 p.m. sample.

Even this does not tell the full story. For if appellant was afflicted with this much alcohol, he was under an unusual and strong stimulus to shake off its effects. All of the expert witnesses were in agreement as to this.

The effect of our analysis appears to be to minimize the influence of drink at the actual moment the admission was made. It also serves to indicate that the duration of the questioning did not work entirely against appellant, for it enabled him to sober up.

Consequently, appellant's assumption that at all times appellant's blood level remained at the level of .257 is unfounded. This is contrary to fact and far from what the jury might reasonably have determined to be the case. Nor is .257 the "extreme" of intoxication. On the contrary, it is close to the low figure (RT 627).

Appellant, in support of his position that intoxication is a factor related to the voluntariness of the statements, relies upon Unsworth v. Gladden, 261 F. Supp. 897 (D. Ore (1966), appeal docketed, No. 21738, 9th Cir., March, 1967. Unsworth, indeed, was an extreme case. The officers awakened Unsworth from his sleep. He could not stand; he was jabbering and babbling; he was loud and aggressive. His oral statements were used against him. The District Court for the District of Oregon found that the statements he made were, "' the product of a mind benumbed or confused by alcohol, made at a time when the defendant himself had no understanding or realization of what was going on or what he was saying', and therefore were inadmissible." 261 F. Supp. at 902. The court below did not find Unsworth persuasive in the instant case because of the stipulation on the part of counsel that appellant's statements might be admitted in evidence and the court below disagreed with the conclusion that voluntary intoxication goes to the admissibility of the statements rather than to the weight to be given them.

Logner v. State of North Carolina, 260 F. Supp. 970 (M.D.N.C. 1966), cited by appellant, was also a case where the suspect was in a state of extreme intoxication due to over-indulgence in alcohol and narcotics, and was subjected to prolonged questioning by teams of

police officers. The court found that the statements made by the suspect were not the product of a rational intellect and a free will.

Both Unsworth and Logner presented situations where the suspect's intoxication amounted to mania, i.e., he was so drunk as to be unconscious of the meaning of his words. We do not have such facts in the instant case. Appellant's degree of intoxication did not render his statements inadmissible; however, his intoxication was a relevant circumstance bearing upon the credibility of the statements, a question exclusively for the jury's determination. The law does not require officers to turn a deaf ear to a suspect lest his tongue, loosened by alcohol, utter a statement he might later regret. Mergner v. United States, supra, 147 F.2d 572 (D.C. Cir. 1945), cert. denied 325 U.S. 850 (1945).

Appellant asserts that his statements were involuntary for two reasons in addition to his intoxication. First, he asserts that the police failed to advise him of his rights and, second, he was suffering from a painful injury.

Appellant's trial was completed before the June 22, 1964, decision in Escobedo v. Illinois, 378 U.S. 478 (1964). Since Johnson v. New Jersey, 384 U.S. 719 (1966), held that Escobedo was not retroactive,

the alleged failure to warn appellant of his right to remain silent and right to counsel is insufficient to hold the statements inadmissible. Miranda v. Arizona, 384 U.S. 436 (1966), is likewise inapplicable. Moreover, appellant clearly indicated to the authorities that he did not want a lawyer even when the officers urged that he get one (RT 493).

"Q. You have to have a lawyer.

"A. I don't have to have a lawyer.

"Q. Yes, in a case like this, you do.

"A. I don't want one"

Appellant's injury was a small abrasion on the forehead (RT 785-786). Appellant merely described his head as "throbbing" and "skinned" (RT 871, 989). The officers noticed only a slight abrasion on his forehead (RT 466, 476, 538). Appellant's own witness, a medical doctor, described the condition as superficial, "an abrasion, just a scrape on the skin. There was no cut." (RT 785, 787).

The District Court, of course, dismissed appellant's contentions of involuntariness on the ground that they had been previously heard and decided. Nevertheless, the District Court had the trial record before it and found no basis in fact or law to rehear the same issues. A review of these facts and law makes it absolutely clear that the District Court

did not abuse its discretion in dismissing appellant's contentions 1 through 3.

II.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY

The trial court in this case correctly instructed the jury on the differences between confessions and admissions (CT 72). It then proceeded to give standard instructions relating to the necessary voluntariness of confessions or admissions (CT 73-74). The instructions were proposed by the prosecution. The defense had made no objection to appellant's statements on the ground of involuntariness.

In Jackson v. Denno, 378 U.S. 368 (1964), the Supreme Court established a constitutional rule requiring a trial judge to make an independent determination regarding the voluntariness of a confession before the confession is submitted to the jury. While the jury could constitutionally be permitted again to pass upon the voluntariness issue, it was not to hear the confession until the trial judge had made an independent determination of its voluntariness.

California adopted that procedure many years ago. See, e.g., People v. Gonzales, 24 Cal.2d 870, 876-877, 151 Pac. 2d 251 (1944). In light of the instructions to the jury given by the trial judge here, and in light of the presumption of correctness attributable to the

acts of public officials in the absence of evidence to the contrary, it is clear that the trial court here actually was satisfied that appellant's statements were voluntary and could be considered by the jury. The trial court instructed the jury in part as follows:

"The law absolutely forbids you to consider a confession or admission in determining the innocence or guilt of a defendant unless the confession or admission was voluntarily made, and although the Court has admitted evidence tending to show that defendant made a confession or admission, you must disregard it entirely unless you, yourselves, by your own weighing of all the evidence, your own judging of the credibility of witnesses, and your own reasonable deductions, conclude that the alleged confession or admission not only was made, but was voluntary." (Emphasis added.) (CT 73).

There is no testimony in this record that any form of coercion, physical or psychological, was used to induce appellant to make his statements. In the absence of objection by counsel, the statements were clearly voluntary as a matter of law and could have gone to the jury under any circumstances. Since there was no question raised at trial to the voluntariness of the statements, it was not even necessary for the trial court to make a preliminary finding and instruct as it did. The trial court, however, chose a course with which appellant should have no complaint. There is no constitutional requirement that the jury decide the

question of voluntariness. 2/.

Appellant, nevertheless, argues that the trial judge did not go far enough in his instructions even though no alternative instructions were proposed by his trial counsel. See People v. Starkey, 234 Cal.App. 2d 822, 829, 44 Cal.Rptr. 738 (1965). Appellant contends that the jury should have been instructed to consider the failure and warn him of his right to remain silent and his right to counsel, and to consider his voluntary intoxication in determining the voluntariness of his confession.

There are, of course, many factors which interplay in a question of voluntariness, among them being the declarant's age, educational background, emotional stability, conditions of incarceration, and length of interrogation. Payne v. Arkansas, 356 U.S. 560, U.S. 315, 321-325 (1958); Crooker v. California, 357 U.S. 433, 438 (1958); Blackburn v. Alabama, supra, 361 U.S. 199, 207-208 (1960); Thomas v. Arizona, 356 U.S. 390, 401 (1958). We are aware, however, of no requirement that the jury be instructed on every conceivable factor which might bear on the issue of whether the statements

2. California law now places the final responsibility of determining admissibility on the trial judge and the jury is not given the opportunity to redetermine the issue. California Evidence Code sections 400-406.

were extorted by physical or mental coercion.

A deliberate attempt to mislead a suspect about his rights, or deliberate refusal to advise him of his rights, or the deliberate denial of his right to outside assistance may, in a given case, be factors relevant to the voluntariness of a statement. Johnson v. New Jersey, supra, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737, 746 (1966); Sessions v. Wilson, 372 F.2d 366, 369 (9th Cir. 1967); Gladden v. Holland, 366 F.2d 580, 582-583 (9th Cir. 1966). The instruction given in this case did not preclude the jury from considering such additional factors. The jury was merely instructed that it could find appellant's statements voluntary even though he was under arrest at the time, was not represented by counsel, was not told that any statement could or would be used against him, and was told that others had made statements against him (CT 74). To the best of our knowledge, this is still an accurate statement of the law. Stroble v. California, 343 U.S. 181, 189 (1951). Appellant's statement that "the jury was unqualifiedly told that the failure of the police to advise appellant of his rights should not be considered as contributing to the involuntariness of his confessions" is manifestly inaccurate (Appellant's Opening Brief, p. 21).

Appellant's contention that the jury should have been instructed to consider appellant's voluntary

intoxication in determining the voluntariness of his statement has already been discussed. The fact of voluntary intoxication goes to the weight to be given the statements, not to their admissibility.

In summary, this issue is a false issue. First, there was no objection to the statements as being involuntary or coerced. Second, the statements, in the absence of any objection or any evidence of coercion, were voluntary as a matter of law. Third, there was no constitutional mandate in this case to instruct the jury on voluntariness. Finally, even though it was not necessary to instruct the jury on voluntariness, the jury was instructed and accurately so.

III.

APPELLANT'S OTHER CONTENTIONS ARE WITHOUT MERIT

Appellant contends that an evidentiary hearing is required to determine whether trial counsel's stipulations of the statements into evidence was a deliberate bypassing of state procedures (Appellant's Opening Brief, p. 25). Of course, as already noted, the District Court declined to entertain the issue of voluntariness because the issue had already been decided against appellant in an earlier federal proceeding. The District Court had discretion to rehear the issue and one of the

reasons for its refusal to exercise its discretion was the deliberate failure of trial counsel to object to the admission of the statements. Where there is not only a failure to object after extensive voir dire and cross-examination of the testifying police officers, but also stipulations to the admissibility of the statements, it is inconceivable that conduct of counsel could be anything other than deliberate.

Appellant suggests that counsel acted under "serious error of California law" but fails to specify what this error was (Appellant's Opening Brief, pp. 25-26). While the petition for a writ of habeas corpus attacked the competency of trial counsel, this contention was abandoned at the hearing in the District Court (Appellant's Opening Brief, p. 8), and is not raised on this appeal. Appellant fails to indicate why he believes the trial record was inadequate for the District Court's determination of the question of deliberate bypassing.

Appellant inaccurately states that the failure to object to the admission of incriminating statements into evidence in no way limits the scope of the federal review of the voluntariness of the statements. Federal review of constitutional questions is limited where there is no contemporaneous objection. Schmerber v. California, 384 U.S. 757, 765, fn. 9 (1965); Henry v. Mississippi, 379 U.S. 443, 448 (1965); Fay v. Noia,

372 U.S. 391, 438-439 (1963); Nelson v. People, 346 F.2d 73, 77-82 (9th Cir. 1965).

Appellant appears to argue that at the time of his trial, California, while purporting to follow the "Massachusetts" rule of giving the jury an opportunity to consider voluntariness after the trial judge has made a preliminary finding and admitted the evidence, actually followed the now unconstitutional "New York" rule because the jury played "the major, if not the only, role in determining the voluntariness of confessions" (Appellant's Opening Brief, pp. 29-35). Consequently, appellant argues, the District Court erred in finding that the appellant had the additional "safeguard" of a preliminary judicial determination of voluntariness. Appellant is in error. California at this time clearly required a judicial determination of voluntariness before the question could be submitted to a jury. People v. Trout, 54 Cal.2d 576, 354 P.2d 231 (1960); People v. Gonzales, supra, 24 Cal.2d 870, 151 P.2d 251 (1944); People v. Jones, 24 Cal.2d 601, 150 P.2d 801 (1944). Now the California procedure for determining the admissibility of a statement is the same as the procedure for determining the admissibility of physical evidence claimed to have been seized in violation of constitutional guaranties.

In this case, even in the absence of objection by counsel, the trial judge's satisfaction with

the legal admissibility of appellant's statements is underscored by the fact that he permitted the defense to explore all aspects of the police role in the taking of the statements and all facets of appellant's physical condition during the presentation of the prosecution's case.

Moreover, where the California Court of Appeal, by written opinion resolved on the merits the factual issue of voluntariness, there is a presumption that its findings are correct. Title 28, United States Code section 2254(d). Scrutiny of the state court record establishes that the state court's determination on this issue is fairly supported by the record. See Townsend v. Sain, 372 U.S. 293, 316 (1963); Culombe v. Connecticut, 367 U.S. 568, 603 (1961).

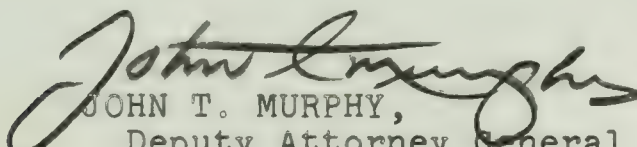
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the petition for a writ of habeas corpus should be affirmed.

DATED: November 8, 1967.

THOMAS C. LYNCH,
Attorney General of California
DERALD E. GRANBERG,
Deputy Attorney General

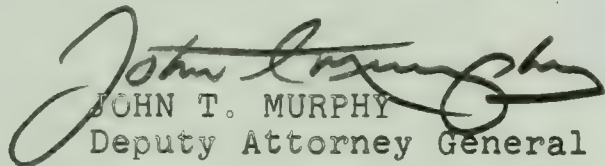
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JOHN T. MURPHY,
Deputy Attorney General
Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 39, 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 8, 1967.


JOHN T. MURPHY
Deputy Attorney General

DEC 14 1967

No. 22,031

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RONALD ANDERSON, doing business as
Channel Marine,

Appellant,

vs.

THE INTERNATIONAL ONE DESIGN SLOOP
"FLIRT", her rigging, tackle and ap-
parel, and ERNEST P. BROWN, her
owner,

Appellees.

**Appeal from the United States District Court
for the Northern District of California**

APPELLANT'S OPENING BRIEF

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FILED

DEC 8 1967

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No. 22,031

IN THE

**United States Court of Appeals
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RONALD ANDERSON, doing business as
Channel Marine,

Appellant,

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THE INTERNATIONAL ONE DESIGN SLOOP
“FLIRT”, her rigging, tackle and ap-
parel, and ERNEST P. BROWN, her
owner,

Appellees.

**Appeal from the United States District Court
for the Northern District of California**

APPELLANT’S OPENING BRIEF

JURISDICTION

“The District Court shall have original jurisdiction, exclusive of the courts of the states, of:
(1) any civil case of admiralty or maritime jurisdiction . . .” 28 USCA, §1333.

The present claim on this appeal arises out of a maritime contract for repairs¹ and as a consequence the

¹Appellant’s complaint alleges that plaintiff is engaged in the business of marine painting and repair, that defendant Brown is the owner and operator of the International One Design Sloop

admiralty court has jurisdiction. *Archawaski v. Hanioti*, 350 U.S. 532 at 535, 76 S.Ct. 617 at 620 (1956); *North Pacific S.S. Co. v. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 39 S.Ct. 221 (1919); *Barker v. U.S. Dist. Court in and for Southern Dist. of Cal., Central Division*, 185 F.2d 585 (9th Cir. 1951).

STATEMENT OF THE CASE

(a) Question involved:

Whether the record discloses a valid accord and satisfaction of Anderson's disputed claim against Brown.

(b) Manner in which question raised:

Appellant (hereafter "Anderson") billed respondent (hereafter "Brown") \$848.21 for work, labor and materials expended in refinishing the hull of defendant's racing yacht, the International One Design Sloop "FLIRT."² Brown objected to the bill claiming that Anderson had contracted to perform the refinishing for the sum of \$500.00, and that that amount was all that was due and owing to Anderson.³ Anderson and Brown were unable to settle the dispute as to whether Brown owed Anderson the additional \$348.21.⁴ Brown

"Flirt" and that said yacht is now lying afloat within San Francisco Bay and within the jurisdiction of the Admiralty Court and that appellant furnished at the instance and request of defendant Brown certain repairs to said yacht. TR, Vol. 1, p. 1, lines 26-32, p. 2, lines 1-7, Paragraphs I-IV of plaintiff's complaint.

²Affidavit of Plaintiff Anderson in Opposition to Defendant's Motion for Summary Judgment, TR, Vol. 1, p. 32, lines 22-32.

³Answer to Complaint, TR, Vol. 1, p. 7, lines 7-11.

⁴Anderson's Complaint, Paragraph 4, TR, p. 2, lines 15-17.

then forwarded a check for \$500.00 marked "Paid in full—endorsement constitutes payment in full." Anderson struck the added language and accepted the check as payment of the \$500.00⁵ which Brown admitted to be due and owing.⁶ Brown refused to pay the remaining \$348.21⁷ and Anderson filed his complaint in admiralty in personam against Brown and in rem against Brown's yacht.⁸ Brown answered admitting that the \$500.00 was due and owing⁹ alleging that an agreement existed between Brown and Anderson whereby Anderson had undertaken to perform the repairs to Brown's yacht for the sum of \$500.00¹⁰ and claiming as a separate answer and defense that Anderson's acceptance of the check constituted an accord and satisfaction.¹¹ Brown thereafter brought motion for summary judgment¹² which was granted by the court below on the ground that no genuine issue of material fact was present in the case.¹³ In reaching this conclusion, the court necessarily rejected Anderson's argument that acceptance of the check did not constitute an accord and satisfaction in that the \$500.00 paid by defendant was admittedly due and owing and accordingly there was no consideration for

⁵Brown's Answer, TR, p. 8, lines 6-19.

⁶"Answering Paragraph V of said Complaint, this defendant admits and alleges to owing only the sum of \$500.00, which sum has already been paid." Brown's Answer, Paragraph III, TR, p. 7, lines 14-16.

⁷Complaint, Paragraph VI, TR, p. 2, lines 15-17.

⁸Complaint, TR, pp. 1-2.

⁹See fn. 6, *supra*.

¹⁰See fn. 5, *supra*.

¹¹Answer, TR, Vol. 1, p. 7, line 29 to p. 8, line 21.

¹²TR, Vol. 1, pp. 13-14.

¹³TR, Vol. 1, p. 35.

a compromise. Obviously, if the court had accepted this argument, there would be genuine issues of material fact including

(a) Whether or not Anderson and Brown contracted to repair the vessel for the sum of \$500.00, and

(b) Whether or not the work performed by Anderson justified a bill of \$848.21.

These issues are clearly raised by Anderson's Complaint¹⁴ and Brown's Answer thereto.¹⁵

SPECIFICATION OF ERRORS RELIED UPON BY APPELLANT

1. The lower court erred in granting defendant's motion for summary judgment and directing dismissal of the action in that there was and is a genuine issue of material fact and defendants were not entitled to judgment as a matter of law.

2. The District Court erred in necessarily finding as a basis for its judgment that an accord and satisfaction existed where the payment made was an amount admittedly due and owing and there was no consideration for the accord and satisfaction.¹⁶

¹⁴TR, Vol. 1, pp. 1-5.

¹⁵TR, Vol. 1, pp. 6-9.

¹⁶If no accord and satisfaction exists there are at least two genuine issues of material fact:

(1) Appellant disputes respondent's contention that appellant agreed to perform the repairs for the sum of \$500.00, and

(2) If no such agreement existed, appellant contends and respondent disputes that the sum of \$848.21 was the value of the repairs.

ARGUMENT OF THE CASE**(A) SUMMARY**

A clear statement of the points of law and facts to be discussed has already been set forth by appellant's Statement of the Case, *supra*. Appellant's basic contention is that an accord and satisfaction, like any other agreement, must be supported by consideration. Since Brown paid an amount (\$500.00) which was not disputed and was admittedly due and owing, there was no consideration for and there could have been no accord and satisfaction of the disputed sum of \$348.21.

(B) POINTS AND AUTHORITIES

Defendant argues that the general rule in California is that acceptance of a check marked "paid in full" constitutes a binding settlement of the entire debt.¹⁷ Defendant overlooks the well recognized exception to the general rule to the effect that an accord and satisfaction, like any other valid contract, requires a consideration. *MacIsaac & Menke Co. v. Cardox Corp.* (1961), 193 Cal.App.2d 661, 14 Cal.Rptr. 523. In that case the defendant contractor had orally agreed with the plaintiff subcontractor to pay the reasonable cost of the additional work made necessary by the defendant's failure to provide plans and equipment in conformance with the original contract. The trial court found the reasonable value of this additional work to be \$15,623.79. On appeal from an adverse judgment,

¹⁷TR, Vol. 2, p. 3, lines 7-13.

the defendant urged that its liability, if any, for such work was limited to the sum of \$8,991.11 by reason of a writing signed by plaintiff which acknowledged receipt of a final progress payment as payment in full of all sums due plaintiff other than the sum of \$8,991.11, as to which there was a dispute. The Appellate Court rejected the contention, stating at pages 670-671:

“There are numerous reasons why defendants’ claim must fail, but we will dislodge it of any merit by merely pointing out that the receipt, the alleged accord agreement, is not supported by any consideration in that the payment of \$6,139.25 [the final progress payment] was admittedly due and owing; therefore, the alleged accord and satisfaction agreement must fail for lack of consideration. (See also: *Moore v. Bartholomae Corp.*, 69 Cal.App.2d 474 [159 P.2d 436]; *D. E. Sanford Co. v. Cory Glass etc. Co.*, 85 Cal.App.2d 724 [194 P.2d 127]; *Egan v. Crowther*, 74 Cal.App. 674 [241 P. 900].)”

A similar result was reached in *Western Concrete Structures Co. v. James I. Barnes Constr. Co.*, 206 C.A.2d 1 (1962). In that case defendant had made a progress payment of \$28,636.20 which was admittedly due and owing. Typed across the face of the check was the notation “Acceptance of this check acknowledges payment in full of all moneys due to date . . .” Defendant argued that acceptance of this check by the plaintiff constituted an accord and satisfaction. The court rejected this contention noting (as in the *Mac-Isaac* case) that the amount paid was *admittedly* due

and owing and accordingly there was no consideration for the alleged accord and satisfaction.

The facts in the present instance fall squarely within the exception to the general rule set forth in *MacIsaac* and *Western Concrete Structures* that settlement by payment must be supported by consideration.

Brown attempts to distinguish the *Western Concrete Structures* case on the ground that it involved two separate invoices while the present dispute involves only one.¹⁸ This is a formalistic distinction which should have no relevance to the proceeding. In both cases the amount paid was admittedly due, owing and undisputed.¹⁹ The record is clear that Brown and Anderson both considered the \$848.21 in two parts. On the one hand was the \$500.00 which was never in dispute, which Brown admitted was due and owing and which Brown alleged was the agreed contract price.²⁰ On the other hand was the \$348.21 additional amount. This was the only amount over which the parties disagreed.²¹ Since Brown, by paying the \$500.00 admittedly due and owing, made absolutely no payment as to the additional disputed sum, there could have been no consideration for an accord and satisfaction of that sum.

¹⁸TR, Vol. 2, p. 3, lines 14-18.

¹⁹TR, Vol. 1, p. 6, lines 14-16: "this defendant (Brown) admits and alleges to owing only the sum of \$500.00 which sum has already been paid."

²⁰Brown's Answer, TR, Vol. 1, p. 6, line 31 to p. 7, line 21; Anderson's Affidavit, TR, Vol. 1, p. 33, lines 1-4.

²¹Fn. 20, *supra*.

CONCLUSION

The basic question before the lower court was whether the parties had reached an accord and satisfaction of the disputed amount (\$348.21). The lower court found that they had, ignoring the clear evidence to the contrary and a well-established exception to a rule of California law. It followed from the court's conclusion, that no genuine issue of material fact remained and as a consequence the court granted Brown's motion for summary judgment. The court clearly erred in doing so. Anderson's appeal should be granted and the matter returned to the lower court for trial of the existing genuine issues of material fact.

Dated, San Francisco, California,

December 8, 1967.

Respectfully submitted,

WILLIAM H. KING,

Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM H. KING,

Attorney for Appellant.

IN THE
United States Court of Appeals
For the Ninth Circuit

F. E. SMITH and V. K. SMITH,
Appellants,

v.

NEAL K. WARREN as District Director of Internal
Revenue, for Washington,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

JOHN RANQUET

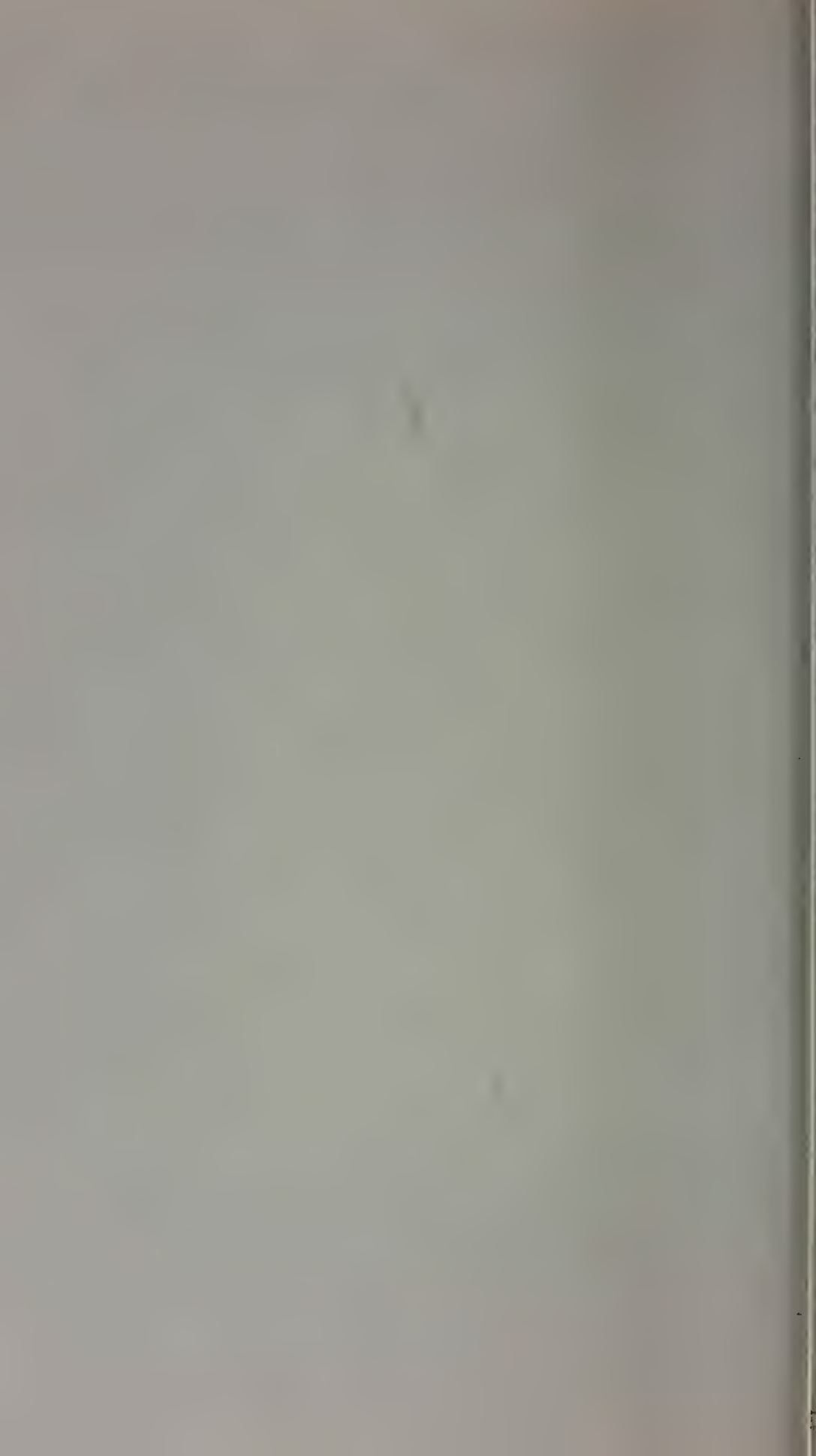
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IN THE
**United States Court of Appeals
For the Ninth Circuit**

F. E. SMITH and V. K. SMITH,
Appellants,

v.

NEAL K. WARREN as District Director of Internal
Revenue, for Washington,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

PREFACE

This brief has been prepared by using, as headings, as much as possible, the requirements set forth in Rule 18 of the United States Court of Appeals for the Ninth Circuit.

Wherever "Clerk's" followed by a number is used herein, it will be intend to refer to the number given to the particular paper by the District Court clerk in the "Certificate of Clerk, U. S. District Court to record on appeal."

Appellant will be referred to as "Plaintiff" and Appellees as "Defendant."

JURISDICTIONAL STATEMENT

A statement upon which it is contended that the District Court had jurisdiction may be summarized by quoting the Findings of Fact, Clerk's 12, as follows:

"1. Plaintiff F. E. Smith is a Puget Sound pilot. Plaintiff V. K. Smith is his wife. Both plaintiffs are citizens of the United States and during the times material here plaintiffs were residents of the Northern King County, Camano Island, and Edmonds, Washington, which are all within the Northern Division of the Western District of Washington of the United States District Court.

"2. Plaintiffs filed timely joint income tax returns for the years 1960 and 1961 with the defendant, Neal S. Warren, District Director of Internal Revenue for the State of Washington. After review and audit of these income tax returns, the Commissioner of the Internal Revenue assessed deficiencies against plaintiffs in the amount of \$759.65 for 1960 and \$647.57 for 1961. These deficiencies were the result of the Commissioner having disallowed plaintiff's deductions claimed for certain travel expenses, entertainment expenses, capital losses and alleged capital gains. Plaintiffs paid these deficiencies assessed, plus interest on June 24, 1964.

"3. On May 27, 1965, plaintiffs filed claims for refund for the deficiencies assessed and collected for 1960 and 1961 in the respective amounts of \$759.65 and \$647.57. By a letter dated November 8, 1965, the Commissioner of Internal Revenue allowed a portion of these claims for refund and disallowed the remainder in the following proportions:

<u>Year</u>	<u>Claimed</u>	<u>Allowed</u>		<u>Disallowed</u>
		<u>Tax</u>	<u>Interest</u>	
1960	\$ 759.65	\$ 578.38	\$ 109.66	\$ 181.27
1961	647.57	532.30	69.01	115.27
	<u>\$1,407.22</u>	<u>\$1,110.68</u>	<u>\$ 178.67</u>	<u>\$ 296.54</u>

"The commissioner of Internal Revenue allowed all automobile expenses incurred by the plaintiffs in traveling to ports or ships outside the Seattle area together with a pro-rata allowance for depreciation. However, all automobile expenses and depreciation incurred in the Seattle area was disallowed as follows:

1960	\$278.02
1961	\$227.65"

STATEMENT OF FACTS

This action was commenced for the recovery of income taxes. Following the agreed pre-trial order (Clerk's 21, 21a), the only issue remaining was whether or not certain transportation expenses were deductible. The transportation expenses disallowed were those incurred by the plaintiff, a Puget Sound pilot, in traveling from taxpayer's home, in which he maintained an office, to assignments in the Seattle area and in returning from Seattle to taxpayer's home (office). (Par. 11 of Pre-Trial Order, Clerk's 21; Par. 5 of Findings of Fact, 13).

In Paragraph 5, Page 3 of the Findings, Clerk's 13, the issue raised was stated as follows:

"5. As a result of the concessions made by the parties in the pre-trial order, the sole issue raised by the pleadings which remained for the Court to determine by trial was whether certain automobile expenses and depreciation incurred by the plaintiffs in the Seattle area are deductible under Sections 162 or 212 of the Internal Revenue Code for 1954."

Findings of Fact 6, 7, 8, 9, 10, and 11, in part, provide a concise statement of the facts involved and are repeated herein as follows:

"6. Plaintiff, F. E. Smith, (hereinafter referred to as plaintiff) is a Puget Sound pilot. He has a federal license issued by the United States Coast Guard as a first-class pilot on Puget Sound and adjacent inland waters and has a Master for steam and/or motor vessels of any tonnage on any ocean. He is a member of Local No. 8 of International Organization of Masters, Mates and Pilots. He is also a member of the Puget Sound Pilots Association, also known as Puget Sound Pilots. Except for a small amount of interest, all of plaintiff's income reported during the years in issue here was earned through this association.

"7. The Puget Sound Pilots Association also known as Puget Sound Pilots is an organization of approximately 30 members who pilot ships for a fee to and from various ports in the Puget Sound area. The fees charged for this service are regulated by state law. The area covered by the Puget Sound Pilots Association is the American waters east of Port Angeles, Washington, and includes March Point (Anacortes), 85 miles north of Seattle; Ferndale, 105 miles north of Seattle, Olympia, 60 miles south of Seattle; Tacoma, 25 miles south of Seattle; as well as Edmonds and Mukilteo which are closer to Seattle than the other ports.

"8. The Puget Sound Pilots Association also known as Puget Sound Pilots maintains a communications and dispatching office in the Exchange Building in downtown Seattle. Requests for pilots are received from ship owners or agents at this office. The association dispatcher then notifies the pilot whose name is next on the duty roster. This office also prepares and mails all statements for fees, collects all accounts receivable and pays all operating expenses. A conference room for Pilots' meetings is maintained at the Exchange Building office. In addition, the association also owns a pilot station on Ediz Hook located near Port Angeles. This station is equipped with two pilot boats, a communications center and facilities for food and lodging. It is from this station

that a pilot embarks on and disembarks from ships arriving from and departing to sea.

"9. In addition to these association services and facilities, *plaintiff also maintains an office in his home. In this residential office plaintiff spent time reviewing various written materials in regard to his duties as a Puget Sound ship pilot; in this connection, he received and reviewed materials in regard to Puget Sound waters and docking facilities. The materials maintained and received are described as: (a) Charts, (b) Army Engineer Blue Prints, (c) Current and Tide Tables, (d) light lists, (e) notice to mariner, (f) port series, (g) Coast pilot, (h) radar books. The Puget Sound Pilot Association dispatcher also notified plaintiff of his pilot assignments on his residential telephone. Plaintiff claimed an allocable share of his home expenses, including depreciation, as ordinary and necessary business expenses, and these expenses were allowed by the Commissioner. The parties have stipulated that, during the years involved, the plaintiff's residence in which this office was maintained was centrally located as to plaintiff's various assignments.*

"10. Depending upon the particular assignment involved, plaintiff may be assigned to report for duty either at some pier along the central Seattle waterfront (an area of approximately three and one-half to four statutory miles) or some other pier along Puget Sound which is outside the central Seattle waterfront. *Plaintiff furnished his own transportation to, from and between piloting assignments. He used public transportation, but he had to use a private automobile in conjunction with public transportation. The plaintiff's wife drove him to and from and between work assignments. While plaintiff was on rotation, he was on call to furnish piloting services 24 hours a day.*

"11. Plaintiff has claimed as income tax deductions all expenses which he incurred in reporting for his assignments as a pilot for ships....*The expenses which plaintiff incurred in traveling to and returning from*

assignments as a pilot for ships located beyond the central Seattle waterfront have already been allowed as income tax deductions by the Commissioner and accordingly are not further discussed in these findings.” (Emphasis mine)

SPECIFICATION OF ERRORS

(1) The court erred in entering its Findings of Fact (clerk’s 12) and in rejecting the Objections to Findings of Fact and Conclusions of Law of the plaintiff (clerk’s 11). The court erred in entering the following portion of Findings of Fact number 11 which reads as follows:

“ . . . Expenses which plaintiff incurred in traveling from his home to assignments as a pilot for ships located within the central Seattle waterfront and expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are non-deductible personal expenses. The Commissioner of Internal Revenue accordingly properly disallowed these claimed deductions....” (As a reference, see Findings of Fact, Clerk’s No. 12, paragraph 11; Objections to Findings of Fact and Conclusions of Law, Clerk’s No. 11.).

The foregoing excerpt from Findings of Fact No. 11 should have read as follows:

“Expenses which plaintiff incurred in traveling from his home to assignments as a pilot for ships located within the central Seattle waterfront and the expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are ordinary and necessary expenses incurred by plaintiff as an independent contractor.” (As a reference, see Objections to Findings of Fact and Conclusions of Law, Clerk’s No. 11.).

(2) The court erred in entering its Conclusion of Law No. 3, which reads as follows:

“3. The expenses which plaintiff incurred in travel from his home to assignments as a pilot for ships located within the central Seattle waterfront and the expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are non-deductible personal expenses under Section 262 of the Internal Revenue Code of 1954. *Steinhort v. Commissioner*, 335 Fed.2d 496 (C.A. 5, 1964) (Clerk’s 12).”

The said Conclusion of Law should have read as follows:

3. The expenses which plaintiff incurred in travel from his home to assignments as a pilot for ships located within the central Seattle waterfront and the expenses which plaintiff incurred in returning from assignments as a pilot for ships located within the central Seattle waterfront to his home are ordinary and necessary expenses under Sections 162 and 212 in the Internal Revenue Code and in accordance with *Hulme, et al. v. U. S.*, Northern District, California, Southern Division, Civil No. 41033, 6-3-65, 65-2 U.S.T.C. 96,295. (Objections to Findings of Fact and Conclusions of Law, Clerk’s No. 11.)

As both of these errors are related, they will be argued as one argument, under the category that the court should have found that the transportation to and from central Seattle waterfront to plaintiff’s home were ordinary and necessary expenses under Sections 162 and 212 of the Internal Revenue Code.

Statutes Involved

It is submitted that the expenses in this case fall within the following statutory provisions of the Internal Revenue Code, 1954:

“Sec. 162 Trade or Business Expenses (a): There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

“(2) traveling expenses (including the entire amount expended from meals and lodgings) while away from home in the pursuit of a trade or business. . . . 26 U.S.C.A. 162—

“Sec. 212. Expenses For Production Of Income. In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year— (1) for the production or collection of income...” 26 U. S. C. A. 212.

“Sec. 167. Depreciation.

“(a) There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear. . . .

“(1) of property used in the trade or business, or

“(2) of property held for the productions of income.” 26 USCA 167

ARGUMENT FOR APPELLANTS

1. Summary

The issue in this case is whether or not the transportation expenses of the plaintiff in traveling from his office, which is located in his home, to and from Seattle, are ordinary and necessary business expenses.

There are three cases involving transportation expenses claimed by a ship pilot. Generally speaking, the plaintiff urges the court to follow the case of *Hulme v. U.S.*, Northern District of California, Southern Division, Civil No. 41033, 6-3-65, 65-2 U.S.T.C. 96,205, 16 A.F.T.R. 2d 5084, hereinafter called *Hulme* case. On the other hand, the defendant relies upon the following cases:

Heuer v. Commissioner, 32 T.C. 947, affirmed 283 F.2d 865, (5th Cir.), hereinafter called *Heuer* case,

Steinhort v. Commissioner, P. H. Memo. T.C. Par. 62,233, affirmed 335 F.2d 496, 64-2 USTC 93,763, (5th Cir.), hereinafter called *Steinhort* case.

The defendant contends that the expenses at issue fall within section 262, of the 1954 Internal Revenue Code, which section disallows personal expenses as deductions.

As to the ordinary and necessary requirements set forth above, the plaintiff testified on page 28 of the transcript of Proceedings:

"Q. Is it ordinary to use your automobile in transportation as far as travel from your office to various points of assignment?

"A. Yes, it is.

"Q. Is it necessary to use it?

"A. I believe so."

See also the testimony of pages 26 and 27 of the transcript of Proceedings as follows:

"Q. Then how do you get to the various places where you are assigned to? What means of transportation do you use?"

"A. I use my automobile and public transportation where available.

. . . .

"Q. Are there any of these places that you were assigned to not accessible by public transportation?"

"A. Yes, sir, some of them are."

The above testimony, as to the necessity for an automobile, is set forth in the following excerpt from Findings of Fact No. 10, quoted in full above, Clerk's 12:

"Plaintiff furnished his own transportation to, from and between piloting assignments. He used public transportation, but he had to use private automobile in conjunction with public transportation."

Besides the above testimony, the parties had stipulated that:

"...during the year's involved, the plaintiff's residence in which this office was maintained was centrally located as to plaintiff's various assignments," Findings of Fact No. 9, Clerk's No. 12, quoted in full above.

It is arbitrary for the defendant in this case to in effect tell the plaintiff how he should conduct his business. It should be noted that the defendant allowed some of the transportation expenses as indicated in the following excerpt from paragraph 11, of the Findings of Fact, Clerk's 12:

"The expenses which plaintiff incurred in traveling to and returning from assignments as a pilot for ships located beyond the central Seattle waterfront have already been allowed as income tax deduction by the commissioner and accordingly are not further discussed in these findings."

Because the pilots maintained an office in Seattle, is no reason for making this arbitrary allocation. It would be an entirely different matter of the evidence were that the plaintiff had to go to the Seattle office before going out on any assignments. The evidence was to the contrary. His visits to the Seattle office were in-frequent. On page 36 of the Transcript of proceedings, the plaintiff testified as follows:

“(By Mr. Ranquet)

“Q. If the Puget Sound Pilot office located at 2208 Exchange Building were used as the office in your home is used, would there have to be some changes made there?

“A. It would have to be much larger to take care of twenty-eight men to maintain the equipment that each pilot has, and I assume he has in his office. It would have to be larger.

“Q. Are you able to concentrate more at home than you would be if you had an office in the Exchange Building?

“A. I believe so, yes, Sir.

“Q. Have you indicated that the office at 2208 Exchange Building did not receive the same material as you had at home; is that correct?

“A. That is correct, Sir.”

While an application of the facts to the statute clearly show that the deductions are allowable, the court decisions in the Ninth Circuit clearly support the plaintiff.

2. The *Hulme* Case Is Dispositive of This Case

The *Hulme* case, involving a ship pilot in San Francisco, is identical to this case, with some insignificant

differences. In that case, the plaintiff pilot also maintained an office in his home and commissioner had disallowed:

“ . . . a portion of the travel expenses claimed in the returns, on the basis that automobile expenses incurred in traveling from home to job assignments and return represented personal commuting expenses and therefore not deductible under Section 262 of the Internal Revenue Code of 1954. . . .”

Page 96205 of 65-2 USTC.

The common area where the *Hulme* case and this case meet is in the fact that in both cases the pilots had offices in their homes. In this case, Finding of Fact No. 9, Clerk's 12, (quoted above) which provides as follows:

“9. In addition to these association services and facilities, plaintiff also maintains an office in his home. In this residential office plaintiff spent time reviewing various written materials in regard to his duties as a Puget Sound ship pilot; in this connection, he received and reviewed materials in regard to Puget Sound waters and docking facilities. The materials maintained and received are described as: (a) Charts, (b) Army Engineer Blue Prints, (c) Current and Tide Tables, (d) light lists, (e) notice to mariner, (f) port series, (g) Coast pilot, (h) radar books. The Puget Sound Pilot Association dispatcher also notified plaintiff of his pilot assignments on his residential phone. Plaintiff claimed an allocable share of his home expenses, including depreciation, as ordinary and necessary business expenses, and these expenses were allowed by the commissioner. The parties have stipulated that, during the years involved, the plaintiff's residence in which this office was maintained was centrally located as to plaintiff's various assignments.”

The plaintiff, in uncontradicted direct testimony, discussed at length what he did in his home. The foregoing Finding of Fact was amply supported. See the Transcript of Proceeding, pages 13, 14, 15, 16, 17; see picture of office, Exhibit 5. The foregoing Finding of Fact and evidence should be compared to Findings of Fact No. IX, in the *Hulme* case, 65-2 USTC 96 206:

"IX. During the years involved herein, plaintiff's principal place of business and his residence were at 79 Summit Avenue, San Rafael, California. He maintained his office in connection with his piloting activities in one room of his home. His occupation required him to do a certain amount of office work. His office contained all of his business equipment in the way of office furniture, desk, chairs, filing cabinets, typewriter and typewriter stand, adding machine, hydrographic literature, business records stationary and business forms, nautical charts and various literature, notices and bulletins pertaining to piloting. Plaintiff had a telephone listed in his name which was used exclusively for business purposes. The second telephone to the house was listed in his wife's name. Plaintiff's business telephone was connected to a 24-hour answering service that received his business calls when no one was home."

While the *Hulme* case was a district court case, it is noted that the government did not appeal the case. In the absence of such an appeal, the doctrine of *stari decises* should be applied in this case. Based upon the *Hulme* case, the decision of the district court in this case should be reversed.

3. The Ninth Circuit Cases Support *Hulme* and This Case

Besides the *Hulme* case, the plaintiff in his argument, cited the following cases: *Rice v. Riddell*, 179 F. Supp.

576 (S.D. Cal. 1959); *Charles Crowther*, 269 F.2d 292, 28 T.C. 1293, hereinafter called the *Crowther* case; *Mathews v. Commissioner*, 310 F.2d 98, 36 T.C. 483, hereinafter called the *Mathews* case. All of the above cases, decided in the Ninth Circuit, should be followed.

The case of *Rice v. Riddell*, *supra*, is particularly pertinent. In that case, the plaintiff musician transported his tuba and bass violin in his automobile from his home to various assignments. He claimed this as transportation expenses and the court allowed the deduction. In allowing the deduction, the court met the argument that the expenses should have been disallowed as commuting expenses because the starting point was the taxpayer's residence, as indicated by the following excerpt from page 578 of 179 Federal Supplement:

"There has been some argument over the fact that Mr. Rice's business was operated from his 'home.' The fact that the premises served plaintiff in a dual capacity does not destroy the right to claim the existence of either character of the address. The evidence shows that Mr. Rice's home was also his business headquarters."

The Ninth Circuit has consistently allowed transportation expenses contrary to the position of the Commissioner. This is aptly summarized on page 156 of Volume 49 of Virginia Law Review as follows:

"The 9th Circuit and the Commissioner have come into conflict on virtually every front of the travel deduction problem discussed heretofore. Rejecting the 'tax home' concept in *Wallace*, the 9th Circuit continued in *Harvey* to repudiate the position of the service that 'a home' will always move whenever an employee's job is deemed indefinite rather than temporary. Finally, in *Hartsell* the court saw fit both

to construe 'home' to mean residence and to strengthen this first thesis by requiring the taxpayer to mitigate his travel expenditures by either moving his home to an available area in proximity to his post of duty or losing a proportionate part of the deduction."

Further, the *Crowther* and the *Mathews* cases, *supra*, indicate the conflict between this court and the tax court. Further, the cases strongly indicate a conflict between the tax court and the Ninth Circuit in the area of the transportation expenses.

The foregoing analysis shows that the law in Ninth Circuit, on transportation expenses, clearly supports the *Hulme* case and the plaintiff. Again, applying the doctrine of *stari decisis*, the plaintiff should be granted judgment for the transportation expenses between his office (home) and Seattle.

4. The Court Erred in Rejecting the *Hulme* Case

In all due respect to the District Court, it erred in rejecting the *Hulme* case. In his opinion, set forth on page 69 of the Transcript of Proceedings, starting on line 8, the court stated as follows:

"(1) That unlike Captain Hulme in the San Francisco U.S. District Court case, plaintiff Captain Smith did receive all his business assignments and income from or through the Pilots Association of which he was a member.

"(2) That as of material facts this case is more like the *Steinhort* case in the 5th Circuit than *Hulme* case in the District Court at San Francisco, or any other case cited by counsel in their respective arguments."

Based upon the above, the trial court evidently made a distinction in the *Hulme* case and this case based upon the fact that the plaintiff herein belonged to a pilot association while in the *Hulme* case, the pilot did not belong to a pilot association.

While there is no argument but what there is such a distinction, that is that Captain Smith belonged to an association but Captain Hulme did not, this distinction is insignificant.

The reason for the existence of the Puget Sound Pilots Association and the function of it shows that there is no distinction. The reason for the existence of the organization is set forth on pages 31 and 32 of the Transcript of Proceedings, testimony of the plaintiff:

“Q. Do you have the knowledge as to why the Puget Sound Pilots were formed?”

“A. Yes, Sir, I do.

“Q. What is that knowledge?”

“A. That knowledge is that it was formed for the protection of the shipping of this area, the shipping, crews, cargo, property, life and the small vessel and of other vessels operating on Puget Sound. It was formed by the laws of the Statute of the State of Washington.”

A recital preceding the Washington statute set forth on page 19 of Exhibit 1, Board of Pilotage Commissioners Rules and Regulations, State of Washington, regulating pilots, provides a guideline of the duties of the pilot:

“An act for the protection of shipping and the safety of human life and property, regulating pilots and pilotage of the waters of Puget Sound and adjacent inland waters. . . .”

Because the plaintiff utilizes a system under the state law whereby he carries out his duty to protect the safety of human life and property, he should not be penalized by a loss of deduction.

Apart from the plaintiff carrying out his duty in utilizing an organization does not change this case from the *Hulme* case. That the plaintiff still has to use his office at home and has limited use of the office maintained by the Puget Sound Pilots Association is indicated by the following excerpts from the Transcript of the Proceedings, starting on page 33:

"Q. Let me ask you this. Is the office in 2208 Exchange Building available for the same use as the office in your home?

"A. They don't have the equipment I have.

"Q. If the Puget Sound Pilot office located at 2208 Exchange Building were used as the office in your home is used, would there have to be some changes made there?

"A. It would have to be much larger to take care of 28 men to maintain the equipment that each pilot has, and I assume he has in his office. It would have to be larger.

"Q. Are you able to concentrate more at home than you would be if you had an office in the Exchange Building?

"A. I believe so, yes, Sir.

"Q. You have indicated that the office at 2208 Exchange Building did not receive the same materials you have at home; is that correct?

"A. That is correct, Sir."

In short, in spite of the plaintiff belonging to Puget Sound Pilots, the plaintiff is still an independent con-

tractor and this is the same as the Captain in the *Hulme* case. The case of *Guy v. Donald*, 203 U.S. 399 (1906), dismissed the function of a pilot association as being very insignificant. In the *Guy* case, the owners of a steamer sued the Virginia Pilot Association for the negligence of one of its members. In rejecting the claims, Justice Holmes made the following pertinent comment in regard to the activities of the Pilot Association:

“All that there is upon which to base a joint liability is that the pilots, instead of taking their fees as they earn them, accomplish substantially the same result by mingling them in the first place, and then, after paying expenses distributing them to those on the active list according to the number of days they respectively have been there. Apart from the possible slight difference between the proportion of days on the active list and days of active service, the case is the same as if each pilot kept his fees, merely contributing to keep up a common office from which his bills might be sent out and where a few details of common interest could be attended to. In the latter case this suit hardly would have been brought. The distinction between it and the one at bar is not great enough to justify a different result. See the *City of Dundee*, 47 CCA 581, 108 Fed. 679, 684, 103 Fed. 696. The second and third questions certified are answered ‘No.’”

In the case of *Mobile Bar Pilots Association v. Commissioner*, 97 F.2d 696, the Commissioner had argued that the Pilots Association, which fulfilled the same duties as herein, was a taxable entity. The association, as petitioner, petitioned the court and the court found that the association was not a taxable entity. In identifying the respective duties of the pilot and the association, the court made the following cogent comments:

"Pilot associations have existed at all ports in civilized countries from time immemorial. It is not necessary for a man to be a member of an association to practice his profession but in the nature of things it would be impossible for him to operate alone. He must meet vessels beyond the bar in all kinds of weather and maintain boats of sufficient size and seaworthiness to permit him to do so. This would be impossible without an organization as the cost would be prohibitive to a single individual.

"For the convenience of shipping it is necessary that headquarters of some kind be maintained at each port so that the pilot can be called when needed. It is necessary for the pilots to have someone to look after their business affairs such as collecting their fees as it would be impracticable for the pilot to do that personally.

"Pilotage is personal service by an individual for which he has a maritime lien on the vessel. The Queen, 9 Cir., 206 F. 148. A pilot is the servant of the owner of the vessel who is responsible to third persons for his negligence or want of skill. *Sherlock v. Alling*, 93 U.S. 99, 23 L.Ed. 819. But an association of which the pilot is a member, similar to petitioner, is not responsible for his acts. *Guy v. Donald*, 203 U.S. 399, 27 S. Ct. 63, 51 L.Ed. 245."

The above case provides an excellent analysis for the existence of Pilot Associations.

As in the *Mobile Bar Pilots* case, the Puget Sound Pilots own facilities in this case; among other things, it owns two boats and a pilot station in Port Angeles. Findings of Fact 8, Clerk's 12. In the *Hulme* case, there was no showing that Captain needed any of these facilities, that is boats or facilities. This means that the plaintiff in this case renders a more extensive service. In view of the additional services rendered, the plaintiff has more need for transportation than in the *Hulme* case.

5. The *Steinhort* Case Does Not Apply and Can Be Distinguished

The court in this case relied upon the *Steinhort* case. On page 69 of the Transcript of Proceeding, the court stated in its opinion, in part:

“That as to the material facts this case is more like the *Steinhort* case in the 5th Circuit than the *Hulme* case of the District Court at San Francisco, or any other case cited by counsel in their respective arguments.”

The *Steinhort* case can be distinguished from this case and the *Hulme* case on the basis that the taxpayer in *Steinhort* did not establish an office or show that he used an office in connection with his business activities.

If the government argues that the transportation expenses in this instance are commuting expenses, it overlooks an essential factor and that is that the taxpayer's office, located in his home, amounts to his first business stop. In other words, commuting, if any in this case, consists of the taxpayer walking from any other part of his home to his office. When he goes from the office to his assignment to pilot ships, he is traveling between two established places of business. This would be in accordance with the rule cited in *Steinhort*, on page 93, 769, of the C.C.H. citation:

“For that matter, as a proposition of logic alone, one could argue persuasively that a worker having places A, B, and C as regular destinations for the day's work, is going from home to B and then to C even though it is done after first stopping at A and C respectively. Yet the law neither is, nor permits itself to be carried away by such logic. It recognizes, first, there where there are two or more established

places of business, all costs of transportation between them is an ordinary and necessary business expense.”

Applying the above rule, the travel from what part of the house to the office is the equivalent of travel to A and the travel from the office to Seattle would be the equivalent of travel from A to B and therefore deductible.

The argument herein made as to *Steinhort* would apply equally to the *Heuer* case.

6. The *Steinhort* Case, in the Fifth Circuit, Is in Conflict With the Ninth Circuit Cases

While the argument has been made that the *Steinhort* and the *Heuer* cases can be distinguished from the *Hulme* case and from this case, an equally good argument is that the *Heuer* and *Steinhort* cases were decided in the 5th Circuit and are directly in conflict with the *Hulme* case in the 9th Circuit. In the *Heuer* case, on page 951, of 32 T.C., in the Tax Court, as support for the court's position that certain travel expenses were non-deductible, the court quoted the Tax Court case of *Charles Crowther*, 28 Tax Court 1293. In the *Crowther* tax court case, transportation expenses were disallowed by the Tax Court; this was reversed by this court; see *Crowther v. Commissioner*, 269 F.2d 292 (9th Circuit C.R. 1959).

As support for it's position in the *Steinhort* case, the Tax Court on the last page of the opinion cited Tax Court case of *Charles Crowther*, 28 Tax Court 1293, and Tax Court case of *Edward Mathews*, 36 T.C. 483; again, both of these cases were reversed by the 9th Circuit; as indicated above, the *Crowther* case was reversed in the 9th Circuit, 269 F.2d 292; the Tax Court

decision in the *Mathews* case was reversed by the 9th Circuit, 210 F.2d 98.

In other words, the Fifth Circuit followed Tax Court cases that in turn relied upon Tax Court cases that had been reversed in the Ninth Circuit.

In view of the conflict between the *Steinhort* and *Heuer* cases, on the one hand, and the *Hulme* case on the other, this Court should resolve the conflict. In resolving the conflict the Court should find for the plaintiff in this case. In Finding for the plaintiff, the Court would be following the *Hulme* case, *Rice* case, *Mathews* case and the *Crowther* case.

SUMMARY

By way of summary, it is submitted that the District Court should be reversed and judgment should be rendered for the plaintiff for the following reasons:

- a. The court erred in applying the *Steinhort* case instead of the *Hulme* case;
- b. The court erred in following the *Steinhort* case in the 9th Circuit;
- c. The court erred in making the tax home of the plaintiff Seattle instead of his residence where he maintains an office.

Respectfully submitted,

JOHN RANQUET,
Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN RANQUET

Attorney for Appellant



APPENDIX OF EXHIBITS

(8) List of Exhibits With Reference to Page Number to Transcript of Proceedings.

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		<i>Identified</i>	<i>Offered</i>	<i>Admitted</i>
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No. 22032

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Appellants

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Internal Revenue for Washington,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

OPINION BELOW

The findings of fact and opinion of the District Court are not officially reported.

JURISDICTION

This appeal involves federal income taxes for the years 1960 and 1961. The taxes in dispute were paid on June 24, 1964. (I-R. 20, 26.) Claims for refund were filed on May 27, 1965 (I-R. 20, 26), and were partially rejected on January 26, 1966 (I-R. 13-19). Within the time provided in Section 6532 of

the Internal Revenue Code of 1954, and on July 28, 1966, the taxpayer brought this action against the District Director for recovery of the taxes paid.¹ (I-R. 1-19.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment of the District Court was entered on March 23, 1967. (I-R. 31.) Within sixty days thereafter, on May 16, 1967, a notice of appeal was filed. (I-R. 34.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

The taxpayer, a Puget Sound ship pilot, incurred automobile expenses in traveling between his residence and Seattle, where he performed pilotage assignments. The question presented is whether those expenses constitute deductible business transportation expenses pursuant to Section 162(a) of the 1954 Code or non-deductible commuting expenses under Code Section 262.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set out in the Appendix, *infra*.

¹ The taxes in issue are limited to those set forth in the pre-trial order. (I-R. 27, 44-45.)

STATEMENT

The facts, as found by the District Court, are summarized as follows:

Taxpayers, husband and wife, during the tax period in question were residents of the Northern King County, Camano Island, and Edmonds, Washington. They filed timely joint income tax returns for the years 1960 and 1961 with the defendant, Neal S. Warren, District Director of Internal Revenue for the State of Washington. (I-R. 25-26.)

Taxpayer², a Puget Sound pilot, has a federal license issued by the United States Coast Guard as a first class pilot on Puget Sound and adjacent inland waters, and has a Master for steam and/or motor vessels of any tonnage on any ocean. Taxpayer is a member of Local No. 8 of International Organization of Masters, Mates and Pilots. He is also a member of the Puget Sound Pilots Association, also known as Puget Sound Pilots, and except for a small amount of interest, all of taxpayer's income reported during the years in issue was earned through this association. (I-R. 27.)

The Puget Sound Pilots Association is an organ-

² Since a joint income tax return was filed by husband and wife, both are appellants here. In this brief, however, the term "taxpayer" refers only to the husband.

ization of approximately thirty members who pilot ships in the Puget Sound area. The fees charged for these services are regulated by state law. The area covered by the Association is the American waters east of Port Angeles, Washington, and includes Marsh Point (Anacortes), 85 miles north of Seattle; Fern- dale, 105 miles north of Seattle, and Olympia, 60 miles south of Seattle, as well as Edmonds and Mukilteo, which are closer to Seattle than are the other ports. (I-R. 27-28.)

The Puget Sound Pilots Association maintains a communication and dispatching office in the Exchange Building in downtown Seattle. Requests for pilots are received from ship owners or agents at this office. The Association dispatcher then notifies the pilot whose name is next on the duty roster. This office also prepares and mails all statements for fees, collects all accounts receivable and pays all operating expenses. A conference room for pilots' meetings is maintained at the Exchange Building office. In addition, the Association also owns a pilot station on Ediz Hook, located near Port Angeles. This station is equipped with two pilot boats, a communications center and facilities for food and lodging. It is from this station that a pilot embarks on and disembarks from ships arriving from and departing to sea. (I-R. 28.)

In addition to these Association services and facilities, taxpayer maintains an office in his home. In this residential office taxpayer spent time reviewing various written materials in regard to his duties as a Puget Sound ship pilot; in this connection, he received and reviewed materials in regard to Puget Sound waters and docking facilities. The materials maintained and received are described as charts, Army Engineer blueprints, current and tide tables, light lists, notices to mariner, port series, Coast Pilot, and radar books. (I-R. 28.) The Puget Sound Pilots Association³ dispatcher also notified taxpayer of his pilot assignments on his residential telephone. During the years involved, taxpayer's residence in which this office was maintained was centrally located as to taxpayer's various assignments⁴. Taxpayer claimed an allocable share of his home expenses, including depreciation, as ordinary and necessary business expenses, and these expenses were allowed by the District Director (I-R. 28-29.)

Depending upon the particular assignment in-

³ Hereinafter referred to as the "Pilots Association" or "Association".

⁴ During the years involved, taxpayer moved his residence from North King County, apparently a suburb of Seattle, to Camano Island, and then to Edmonds, located approximately seventeen miles from Seattle. (II-R. 16, 66.)

In light of taxpayer's various residential locations, then, the parties' stipulation that his residences were "centrally located" as to assignments (II-R. 22) presumably was intended to mean that taxpayer resided geographically well within—rather than on the periphery of—the general Puget Sound area where he received his assignments. In this connection, it should be noted that Seattle is also centrally located among those assignment ports (Ex. 2).

volved, taxpayer may report for duty either at some pier along the central Seattle waterfront (an area of approximately three and one-half to four statutory miles) or some other pier along Puget Sound which is outside the central Seattle waterfront. (I-R. 29.) The taxpayer provided his own transportation to, from, and between work assignments, using both his private automobile and public transportation⁵. While taxpayer was on rotation, he was on call to furnish piloting service twenty-four hours a day. (I-R. 29.)

Taxpayer has claimed as income tax deductions all expenses which he incurred in reporting for his assignments as a pilot for ships. The expenses which taxpayer incurred in traveling between his home and assignments as a pilot for ships located at a pier other than one on the central Seattle waterfront were allowed as income tax deductions by the District Director and are not in issue here. The District Director disallowed those expenses which taxpayer incurred in traveling between his home and the central Seattle

⁵ According to taxpayer's testimony, his wife drove him in their private automobile to and from assignments in Seattle and also to and from several other areas, some of which were apparently not readily accessible by public transportation. In certain other instances his wife drove him to and from the appropriate bus depot, e.g., in Seattle, where the taxpayer would take a bus to and from assignments in other ports. In some instances, it may not have been practical for taxpayer to drive his car to a port city and park it because before returning home he might receive an assignment in another port city where public transportation was not readily available back to where his car would have been parked. (I-R. 29; II-R. 26-28.) The only transportation expenses disallowed by the District Director were for trips between the central Seattle waterfront and the taxpayer's residence. (I-R. 29, 30.)

waterfront as non-deductible personal expenses. (I-R. 29.) The District Director's determination was upheld by the District Court. (I-R. 30.) This appeal followed. (I-R. 34.)

SUMMARY OF ARGUMENT

It has long been established that the costs incurred in commuting between a taxpayer's residence and his job are non-deductible personal expenses. Taxpayer, a ship pilot, when traveling between his home and the central Seattle waterfront, where he reported for pilotage assignments, was not different from the ordinary suburb-to-city commuter. Accordingly, the transportation costs arising out of his trips to and from Seattle were non-deductible personal expenses.

Taxpayer's argument that the office in his residence was his principal place of business and, therefore, that he did not commute to Seattle, is unsupported by the record. The economic life of the taxpayer was centered in Seattle. There he performed a substantial portion of his pilotage assignment; there he derived virtually all of his income; and there the Puget Sound Pilots Association, of which he was a member, carried on virtually all of the commercial aspects of the business of providing pilotage service. Taxpayer's activities in his residential office were concerned primarily with maintaining—through reading and study—his

professional skills as a ship pilot, a profession he carried on primarily at the Seattle port and, to a lesser extent, at other ports to which he was assigned. His residential office activities are similar to the comparable studies pursued in their homes by other professional people, e.g., doctors and lawyers, who, like the taxpayer here, commute to, and carry on their professions at, their downtown offices or elsewhere outside their homes. Accordingly, the District Court's finding that taxpayer was simply commuting to and from Seattle, where he pursued his business, and his home is not clearly erroneous.

ARGUMENT

THE TRANSPORTATION EXPENSES INCURRED BY TAXPAYER IN TRAVELING BETWEEN HIS RESIDENCE AND SEATTLE WERE NON-DEDUCTIBLE COMMUTING EXPENSES

- A. *Since the expenses involved here were incurred in commuting between the taxpayer's residence and Seattle, his principal place of business, they are non-deductible personal expenses.*

The question on this appeal is whether automobile transportation expenses—including amounts for depreciation, maintenance and operation—incurred by the taxpayer in traveling between his home and the central Seattle waterfront are non-deductible commut-

ing expenses or deductible business transportation expenses. Under Sections 62 and 162(a) of the 1954 Code, Appendix, *infra*, business transportation expenses are deductible from gross income to arrive at adjusted gross income—whether or not incurred “while away from home” within the meaning of Section 162(a) (2) of the Code ⁶. Sec. 1.62-1(g) Treasury

⁶ Accordingly, in the instant case, we are not relying on, or in any way concerned with, the controversial meaning of (Section 162(a) (2) “home” presented in *Commissioner v. Stidger*, 386 U.S. 287 (1967) reversing 355 F. 2d 294 (C. A. 9th, 1965). For that matter, even where it was assumed that the business transportation versus commuting expense question involved in the instant case was to be decided under the provisions of Section 162(a) (2), it was recognized that the dispute over the meaning of “home” need not necessarily be resolved. *Steinholt v. Commissioner*, 355 F. 2d 496, 503-504 (C. A. 5th, 1964). The primary question here is whether the taxpayer’s principal place of business was located in Seattle or in his residence, not, as in *Stidger, supra*, whether his “home” should be considered to be located at his principal place of business.

It is the Commissioner’s long-standing position that Section 162(a) (2), which allows the deduction of “traveling expenses”, including amounts spent for meals and lodging as well as for transportation, applies only where a taxpayer incurs such expenses “while away from home” either overnight or to obtain sleep or rest. *Commissioner v. Bagley*, 374 F. 2d 204 (C. A. 1st, 1967), petition for certiorari pending (October, 1967, Term, No. 155); *Correll v. United States*, 369 F. 2d 87 (C. A. 6th, 1966), petition for certiorari granted June 12, 1967 (October, 1967, Term, No. 113); see also *James v. United States*, 308 F. 2d 204, 206-207 (C. A. 9th, 1962). While taxpayer here has not attempted to prove that his trips required him to obtain sleep or rest, he does not claim any meal or lodging expense deductions. (I-R. 26-27.) Accordingly, it is not necessary to determine here the validity of the Commissioner’s sleep-or-rest rule under Section 162(a) (2), a question now pending before the Supreme Court in the *Correll* case, *supra*. Instead, the question here—under the general terms of Section 162(a)—is simply whether the expenses involved were (Section 162(a)) “ordinary and necessary expenses * * * incurred * * * in carrying on any trade or business” which, as hereafter discussed, turns on whether those expenses were incurred in traveling between two widely separated places of business, as taxpayer contends, or between his residence and his principal place of business, as we contend.

Indeed, as early as 1919, prior to the enactment of the original “traveling” expense provision, Section 214(a) (1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, the Commissioner had recognized that business transportation expenses were deductible as “necessary” business expenses under Section 214 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Treasury Regulations 45 (1919 ed.) Art. 292. Due, however, to an apparent legislative oversight, from 1944 until the effective date of Section 62(2) (C), Appendix, *infra*, employees who chose the standard deduction could not deduct business expenses, including amounts spent on transportation, incurred in the course of their duties unless they were reimbursed by their employers or the expenses were incurred “while

Regulations on Income Tax (1954 Code), Appendix, *infra*; *Bell v. Commissioner*, 13 T. C. 344 (1949); *Duncan v. Commissioner*, 17 B.T.A. 1088 (1929), affirmed *per curiam*, 47 F. 2d 1082 (C. A. 2d, 1931⁷); see *Sullivan v. Commissioner*, 1 B.T.A. 93 (1942); *Steinhort v. Commissioner*, 335 F. 2d 496, 504-505 (C.A. 5th, 1964) (and see the cases there cited). But commuting expenses—the transportation expenses incurred by a taxpayer in traveling between his residence and his principal place of business or employment—are

away from home". Internal Revenue Code of 1939, Section 22(n), as added by Section 8(a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231. Therefore, employees using the standard deduction who were not reimbursed for transportation costs incurred on daily trips tried to deduct them as "traveling" expenses in determining adjusted gross income on which the standard deduction was computed. But the Commissioner, in applying his sleep-or-rest-rule, disallowed any such deductions based on one-day trips. Apparently to prevent such discrimination against employees, the courts anomalously allowed transportation expenses incurred on one-day trips to be deducted as "traveling" expenses while they, at the same time, denied deductions for the cost of meals on the same trips on the ground that the travel was not "away from home". See, e.g., *Winn v. Commissioner*, 32 T.C. 220, 224-225 (1959) (allowing transportation expense deductions but disallowing meal expense deductions on the same trips); *Summerour v. Allen*, 99 F. Supp. 318 (M.D. Ga., 1951) (meal expense deductions disallowed; transportation expense would have been allowed if amount spent away from home county had been proved); *Podems v. Commissioner*, 24 T.C. 21, 23 (1955); see also *Chandler v. Commissioner*, 226 F. 2d 467 (C. A. 1st, 1955); cf. *Commissioner v. Bagley*, 374 F. 2d, p. 208.

Apparently as a consequence of the litigation involving employees' attempts to deduct unreimbursed transportation expenses incurred on one-day trips, it has been generally assumed—as is evident from many of the cases cited herein—that the deductibility of transportation expenses is governed solely by Section 162(a) (2). While, as indicated *supra*, this is not the case, the distinction that has been drawn between deductible business transportation expenses and non-deductible commuting expenses by judicial and administrative interpretations of Section 162(a) (2) is essentially the same distinction that must be made in the instant case under the general terms of Section 162(a).

⁷ For example, in *Duncan, supra*, the meal and lodging expenses of an itinerant traveling salesman were held to be non-deductible personal expenses because not incurred while away from home (p. 1091), while his expenses for (p. 1092) "entertainment of customers, * * * railway and Pullman fares, and items of similar character" were allowed as business expenses to the extent that the Commissioner had determined that they had actually been incurred.

non-deductible personal expenses. Sec. 262, Appendix, *infra*; Secs. 1.62-1(g), 1.162-2(e) and 1.262-1(b) (5) of the Treasury Regulations on Income Tax (1954 Code), Appendix, *infra*; *Sullivan v. Commissioner*, *supra*; *Commissioner v. Flowers*, 326 U.S. 465 (1946); *Steinhort v. Commissioner*, 335 F. 2d 496, 503 (C. A. 5th, 1964) (and see the cases there cited); *Heuer v. Commissioner*, 283 F. 2d 865 (C. A. 5th, 1960), affirming *per curiam* 32 T.C. 947 (1959). Indeed, since 1922, the Commissioner's Regulations have provided that commuting expenses are not deductible as business expenses ⁸. Since this regulatory provision has survived numerous statutory re-enactments ⁹, it must be regarded as having received implied Congressional approval. *Commissioner v. Flowers*, *supra*, pp. 469-470¹⁰; *Steinhort v. Commissioner*, *supra* p. 503; *Barnhill v. Commissioner*, 148 F. 2d 913 (C. A. 4th,

⁸ See Treasury Regulations 62 (1921 Act), Art. 101 (a); Treasury Regulations 65 (1924 Act), Art. 102; Treasury Regulations 69 (1926 Act), Art. 102; Treasury Regulations 74 (1929 ed.), Art. 122; Treasury Regulations 77 (1932 Act), Art. 122; Treasury Regulations 86 (1934 Act), Art. 23(a)-2; Treasury Regulations 94 (1936 Act), Art. 23(a)-2; Treasury Regulations 101 (1938 Act), Art. 23(a)-2; Treasury Regulations 103 (1939 Code), Sec. 19.23(a)-2; Treasury Regulations 111 (1939 Code), Sec. 29.23(a)-2; Treasury Regulations 118 (1939 Code), Sec. 39.23(a)-2(i); Treasury Regulations on Income Tax (1954 Code), Secs. 1.62-1(g), 1.162-2(e) and 1.262-1(b) (5).

⁹ See Revenue Act of 1924, c. 234, 43 Stat. 253; Sec. 214(a); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 214(a); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23(a); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23(a); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23(a); Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 23(a); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 23(a); Internal Revenue Code of 1939, Sec. 23(a) (26 U.S.C. 1952 ed., Sec. 23(a)); Internal Revenue Code of 1954, Sec. 162.

¹⁰ As stated in *Flowers*, *supra*, pp. 469-470, the predecessor of Section 162(a) (2) was "to be contrasted with" the predecessor of Section 262 and, "in light of the interpretation given [the former] * * * [by] Treasury Regulations", commuting expenses are not deductible.

1945); see *Helvering v. Winmill*, 305 U.S. 79 (1938); *Cammarano v. United States*, 358 U.S. 498, 510-511 (1958); *Commissioner v. South Texas Co.*, 333 U.S. 496, 501 (1948).

In accord, we submit, with the foregoing principles, the District Director allowed the taxpayer to deduct all of his transportation expenses incurred in traveling *between* various pilotage assignments, whether their locations were along the central Seattle waterfront or elsewhere. Further, having determined that Seattle was the taxpayer's principal place of business, the District Director allowed him to deduct all of his transportation expenses incurred in traveling *between* his home and pilotage assignments ports *other than Seattle*¹¹. The only expenses in issue, then, are those incurred in commuting between the taxpayer's residence and Seattle, which the Commissioner disallowed on the ground that they were non-deductible personal expenses. (I-R. 26, 29; II-R. 17-19, 21, 29-30, 46-48, 60, 62.)

The taxpayer—who did not contend in the District

¹¹ Such expenses are deductible because they were incurred on trips taking the taxpayer away from Seattle. When a taxpayer has (*Steinhart v. Commissioner, supra*, p. 504) "two or more established places of business, all costs of transportation between them * * * [are] ordinary and necessary business expense[s]" primarily because a taxpayer cannot be expected to avoid such expenses by moving away from his principal place of business—here, Seattle. In that sense, they are required by the exigencies of his business. *Sherman v. Commissioner*, 16 T.C. 332 (1951); *Chandler v. Commissioner*, 226 F. 2d 467 (C. A. 1st, 1955); see *Wright v. Hartsell*, 305 F. 2d 221, 225 (C. A. 9th, 1962).

Court and does not contend in his brief here that any port city other than Seattle was his principal place of business—contends that his residence was his principal place of business because he maintained an office there in which he carried on certain business study activities. Because of that residential office, the taxpayer contends that he is not a commuter at all, except insofar as he walks (Br. 20) “from any other part of his home to his office”. Accordingly, unlike most other working taxpayers who must bear the cost of commuting to work without tax deduction therefor, the taxpayer contends that all costs incurred in leaving his residence and traveling to and from work are deductible¹². We contend that the District Court’s finding that the expenses in question are non-deductible commuting expenses is correct because the record clearly indicates that Seattle was the taxpayer’s principal place of business¹³.

Here, taxpayer himself admitted (II-R. 26) that during the years involved, he went “to (the) docks in

¹² As indicated, *supra*, taxpayer has been allowed all transportation expenses incurred in traveling between assignments and between his home and assignment port cities other than Seattle. See fn. 11, *supra*.

¹³ Since the primary question in this case—whether taxpayer’s principal place of business was Seattle, as we contend and as the District Director contended below, or the taxpayer’s residential office, as he contends—is essentially factual (*United States v. Mathews*, 332 F. 2d 91 (C. A. 9th, 1964); *Peurifoy v. Commissioner*, 358 U. S. 59 (1958); *Green v. Commissioner*, 35 T. C. 764 (1961), affirmed, 298 F. 2d 890 (C. A. 6th, 1962)), the District Court’s holding sustaining the Director’s position is subject to the clearly erroneous rule (*Commissioner v. Duberstein*, 363 U.S. 278 (1960)).

the Seattle area" "around 50" percent of the time to perform his pilotage assignments¹⁴. That testimony is supported by the general pattern of pilotage volume in the Puget Sound area, most of which, as taxpayer testified, is performed in the Seattle port area. (II-R. 67.¹⁵) Further, Seattle was centrally located among taxpayer's assignments. (Ex. 2; II-R. 10, 64-67.)

Taxpayer received virtually all of his income from the Pilots' Association in Seattle. (I-R. 27; II-R. 49-50.) Further, it was in Seattle that the Association had extensive facilities from which the dispatcher notified taxpayer of his assignments and in which it carried on the vital business of marketing pilotage services and billing ship owners upon which the livelihood of its members depended. (II-R. 23, 25, 30, 49-54.) Although the dispatcher in Seattle often notified taxpayer by telephone of assignments at his home, he was

¹⁴ Other testimony by taxpayer, admittedly a "guess", could possibly be construed to conflict with his testimony that he performed about fifty percent of his work at the Seattle port area. (II-R. 18, 28.) However, as already stated herein, taxpayer has not contended and does not contend that any port city other than Seattle was his principal place of business. Moreover, to support any such contention, the taxpayer would presumably have, or could obtain from the Association, records to show where his assignments were performed during the years involved and, for that matter, during other years. His failure to introduce such evidence can only be taken to mean that such evidence would not support such a contention. See *Meier v. Commissioner*, 199 F. 2d 392, 396 (C. A. 8th); 9 Mertens, *Law of Federal Income Taxation* (Rev.), Sec. 50.59, fn. 88.

¹⁵ Indeed, at least by 1962, the Pilot's Association reimbursed its members, in specified amounts, for travel expenses incurred on pilot assignments to piers other than those located in Seattle. (II-R. 60-67.) The size of that allowance is apparently based upon the distance a particular pier is located from Seattle (Ex. 11), in recognition of the extraordinary costs incurred by pilots in traveling away from Seattle to work because most of the work is performed in Seattle (II-R. 66-67).

not required by his business to be at his home to receive assignments—even when his name was placed at the top of the duty roster administered by the Association¹⁶. Instead, taxpayer could be away from his home and his wife could notify the Association of his whereabouts or, if both he and his wife left their home, he could directly notify the Association. This he also sometimes did when finishing another assignment (without calling home). (II-R. 50-51, 56.)

Taxpayer strives to diminish the significance of the Pilots' Association¹⁷ and contends that he is an independent contractor. These contentions, however, do not support his argument that his office was his principal place of business¹⁸. In reality, taxpayer's office is no different from those found in the homes of many other professional people.

Aside from the five or ten-minute task of prepar-

¹⁶ When a pilot's name came to the top of the roster, he was on call to furnish services twenty-four hours a day. (I-R, 28, 29; II-R. 25, 49.)

¹⁷ On its partnership returns for the taxable years in question, the Association labels itself a voluntary association of sole proprietors. (Exs. 8, 9.) A reading of the Association's by-laws (Ex. 10), however, discloses that Article III, concerning admission to membership, provides for an investigation of prospective members to assure their desirability as business associates and Articles XI and XII, dealing with the duties of the trustees and president of the Association, clothe them with powers usually found in officers of a going concern. Article XXII requires a resigning or retiring member to surrender his state pilot license and enter into a covenant not to compete for five years (See also II-R. 25, 49-50.)

¹⁸ We concede that taxpayer may be an independent contractor. But the independent contractor-employee dichotomy, developed in an unrelated area of law, is irrelevant to the problem of establishing taxpayer's principal place of business. *Heuer v. Commissioner*, 32 T. C. 947, 952 (1959); *Steinholt v. Commissioner*, 335 F. 2d 496, 499 (C. A. 5th, 1964).

ing a dues card for each assignment, which he sometimes also prepared aboard ship (II-R. 54-55), taxpayer states that he spent time in his office studying hydrographic literature. (II-R. 17-18; see also II-R. 13-16, 20, 25-26, 33, 36-37, 39; Ex. 5). Not only is much of this same literature found in the Association's Seattle office (II-R. 52-54) and in its Puget Sound Pilots House, where the taxpayer sometimes studied (II-R. 57, 59), but the information contained in the literature is directly related to taxpayer's professional qualifications (Ex. 7, pp. 9-11; II-R. 12-16, 18, 20). As he admits, a pilot, regardless of his geographic area, must be aware of the changes in his pilotage district. (II-R. 33.) In essence, the taxpayer's office activities amount to no more than a professional person's maintenance of his skills by keeping abreast of current literature. Certainly, many doctors, lawyers, and other professional people, whose livelihoods are earned at their downtown offices or similar locations to which they commute from their homes, must also keep abreast of their professional literature by studying at home. That does not, however, convert their home studies into their business headquarters to allow them the tax deduction claimed here. Similarly, here, in the light of the circumstances disclosing that taxpayer earned his pilotage income substantially at the central Seattle waterfront and, to a lesser extent, at other ports, and

the pilotage business activities carried on by the Association in Seattle on his behalf, his study activities in his residential office are insufficient to convert it from a professional person's study into his principal place of business. *Steinhort v. Commissioner*, 335 F. 2d 2d 496 (C.A. 5th, 1964); *Heuer v. Commissioner*, 283 F. 2d 865 (C. A. 5th, 1960), affirming *per curiam* 32 T.C. 947 (1959); cf. *Flowers v. Commissioner*, decided August 7, 1944 (P-H Memo T.C., par. 44-263), reversed, 148 F. 2d 163 (C. A. 5th, 1945), reversed, 326 U.S. 465 (1946); *Green v. Commissioner*, 35 T.C. 764 (1961), affirmed, 298 F. 2d 890 (C. A. 6th, 1962).

B. *The Fifth Circuit's decisions in Heuer v. Commissioner and Steinhort v. Commissioner support the position of the District Director here; the District Court decision in Hulme v. United States is distinguishable and, moreover, may be erroneous*

There are apparently only two appellate decisions—both by the Fifth Circuit—directly involving the deductibility of transportation expenses incurred by ship pilots in traveling between their residences and their pilotage assignment ports. In *Heuer v. Commissioner*, 283 F. 2d 865 (1960), affirming *per curiam* 32 T.C. 947 (1959), and *Steinhort v. Commissioner*, 335 F. 2d 496 (1964), affirming and remanding a decision of October 2, 1962 (P-H Memo T.C., par.

62, 233), the Fifth Circuit held, in accord with our position here, that transportation expenses incurred on trips between assignment areas and between taxpayers' residences and ports outside of the port area constituting the taxpayers' regular or principal places of work were deductible business expenses (see *Steinhort v. Commissioner, supra*, pp. 498, 502, 504-505), but that expenses incurred in commuting between their residences and their principal places of work were non-deductible personal expenses (*Steinhort, supra*, p. 504). The facts in those cases, we submit, are virtually identical to the facts in the instant case.

Like the taxpayer here, the pilots in *Heuer* and *Steinhort* belonged to pilots' associations which gave them assignments both in the port cities where they performed a substantial portion of their piloting and also in other more remote ports in their general geographical pilotage areas. In those cases the taxpayers were often required to travel considerable distances to carry out their assignments. Like the taxpayer here, when traveling between his residence and Seattle, the pilots in *Heuer* and *Steinhort* customarily reported to their job assignments by private automobile—in those cases usually because of the inadequacy or inconveni-

ence of public transportation'⁹. In *Steinhort*, the Fifth Circuit, after allowing the deduction of the expenses for the remote port trips and between-assignments trips, pointed out (335 F. 2d, p. 503) that the transportation expenses incurred in traveling between residence and business city, like those involved here, were not peculiar to pilots, but rather characterized a way of life for millions of Americans, who daily commute between their homes in the suburbs and their jobs in the city. A pilot's comparable commuting expenses, reasoned the court, are also non-deductible personal expenses.

The *Heuer* and *Steinhort* decisions, we submit, are correct and should be followed here. Section 162(a) must be read in conjunction with the principle set forth in Section 262, Appendix, *infra*, provides that 'no deduction shall be allowed for personal, living, or family expenses.' The well-established rule that expenses incurred in commuting between residence and established place of business are not deductible is

⁹ While taxpayer in the instant case testified that there was inadequate public transportation for his travel between his residence and some ports other than Seattle (II-R. 27) (which trips are not in issue here), there is no evidence here that when taxpayer chose to live within the Seattle area, as he did during the years involved when he lived in North King County and after he moved from Mamano Island to Edmonds (II-R. 16-17, 66; Ex. 2), he did not have suitable public transportation between his home and the Seattle piers. In any event, while public transportation in many urban areas may be less efficient than what many taxpayers consider desirable and, therefore, such taxpayers choose to commute by private automobile from their suburban residences to the city (as, in some cities, the majority of commuters do), that fact obviously does not justify the deduction of such typical personal expenses.

based on the making of a reasonable accommodation between the policies of Sections 162(a) and 262 in the light of rational, practical, and equitable considerations. Many—if not most—taxpayers either cannot, or for business, social, and family reasons, choose not to, live next to their work and must, therefore, incur some commuting expenses just as taxpayers must—without tax effect under Section 162(a)—change their business locations and be clothed and housed in appropriate fashion, if they are to pursue their business effectively ²⁰. Today, millions of taxpayers commute

²⁰ Amounts paid for daily meals, lodging, clothing, and a considerable array of other expenses that may be essential to life and, indeed, essential to earning a living, do not serve to reduce "gross income" for tax purposes. For example, a given corporation may require its salesmen or executives to don a clean shirt every day, to wear expensive suits, to drive a certain make of automobile, or even to live in a certain fashionable suburb. Even though the employee prove that but for his employer's requirements he would not have spent as much on his clothes, car or home, no part of these costs is deductible. The costs incurred by an employee in moving to a new business location are not deductible under Section 162(a) even though no part of the expenses would have been incurred if the taxpayer were not pursuing his business. *United States v. Woodall*, 25 F. 2d 370, 373 (C. A. 10th, 1958), certiorari denied, 358 U.S. 824. Accord *Koons v. United States*, 315 F. 2d 542, 544 (C. A. 9th, 1963). (Section 217 of the 1954 Code, as added by Section 213 of the Revenue Act of 1964, P.L. 88-272, 78 Stat. 19, modified the holdings in *Woodall* and *Koons*, *supra*, by allowing the deduction of certain direct moving expenses. Note, however, that even where the transfer is made solely at the behest of the taxpayer's employer, Section 217 does not provide for the deduction of many of the indirect expenses of moving—e.g., temporary living expenses at the new location, expenses incurred in house or apartment hunting, and expenses incurred on trips made for the purpose of selling the old residence—none of which would have been incurred if the taxpayer had not been pursuing his trade or business by changing business locations. See H. Rep. No. 749, 88th Cong., 2d Sess. p. A58 (1964-1 Cum. Bull. (Part 2) 125, 306); *England v. United States*, 382 F. 2d 414 (C. A. 7th, 1965), certiorari denied, 382 U.S. 986 (1966).) Similar loss incurred on the sale of a residence occasioned by the transfer of an employee to a new business location—even where the transfer is made solely at the behest of his employer—does not reduce his taxable income. *Bradley v. Commissioner*, 324 F. 2d 610 (C. A. 4th 1963), affirming 39 T.C. 652 (1963). *Pederson v. Commissioner*, 46 T.C. 155 (1966); *Loflin v. Commissioner* (W. Tenn.), decided March 8, 1967 (19 A.F.T.R. 2d 1091); *Hayes v. Commissioner*, decided June 8, 1966 (P-H Memo T.C., par. 66,123). Although expenditures of this kind may be helpful in furthering the taxpayer's business, the relationship between such expenditures and the taxpayer's business is too intangible and

between their suburban residences and their business areas located downtown or elsewhere, often in the suburbs. Some use public transportation; others find it either practically necessary or, at least, substantially more convenient—in the light of available public transportation and the costs involved—to commute by automobile, often considerable distances. Regardless of the method of transportation chosen or distances travelled, however, the well-established rule that such expenses are non-deductible “personal”—not “business”²¹—expenses is clearly justified by the need to treat such similarly situated taxpayers equally. *Steinhort v. Commissioner*, 335 F. 2d, pp. 503-505²².

The taxpayer here relies extensively on *Hulme v. United States* (N.D. Calif.), decided June 3, 1965 (16

mote to qualify them as Section 162(a) “ordinary and necessary expenses * * * incurred * * * in carrying on any trade or business * * *.” In the end, they are more accurately described as “personal, living, or family expenses” which the Code specifically makes non-deductible.

²¹ Such commuting expenses are not (Section 162(a) (2)) “incurred * * * in carrying on any trade or business (emphasis supplied) but, instead, are incurred so that a taxpayer may travel to that place where he carries on his business. Cf. *United States v. Woodall*, 255 F. 2d 370, 373 (C. A. 10th, 1958), and *Koons v. United States*, 315 F 2d 542, 544 (C. A. 9th, 1963).

²² To be sure, in certain exceptional situations, usually involving remote, uninhabitable, and temporary job locations, transportation expenses somewhat similar to expenses incurred in commuting between residence and established place of business have been held deductible, primarily on the grounds that they were unavoidable and were incurred in what was actually business travel. See *Steinhort v. Commissioner*, 335 F. 2d, pp. 503-504. But obviously it would be administratively impossible to determine fairly which suburban or urban commuters have located their homes as close as is practically possible to their work locations and have chosen the most economical means of commuting, whether bus, train, or automobile, so as to allow them to deduct their commuting expenses, while not allowing other similarly situated commuters to deduct theirs. Moreover, in the instant case, the taxpayer has not attempted to prove either that he could not have lived in, or closer than he did to, Seattle. See fn. 19, *supra*.

A.F.T.R. 2d 5084), where apparently all of a ship pilot's transportation expenses were held to be deductible on the ground that, on the facts in that case, the taxpayer's home constituted his principal place of business. The taxpayer here points out that, like the taxpayer in *Hulme*, he maintained an office in his home, whereas that point was not developed in either the *Steinhort* or the *Heuer* case ²³. The taxpayer, however, overlooks the significance of the office in *Hulme*—and the insignificance of his office here—in the light of the surrounding circumstances in each case which distinguish *Hulme* from the instant case.

In *Hulme*, taxpayer was not a member of a pilots' association and, therefore, carried on at his residence essentially the same business activities as are carried on by such an association on behalf of its members at its offices. By contrast, in the instant case, taxpayer used his office essentially only for professional study (I-R. 28; II-R. 17-18; see also II-R. 13-16, 20, 25-26, 33, 36-37, 39; Ex. 5.) All of the activities that Hulme carried on in his office—soliciting business, billing and the record—keeping connected therewith—were carried on here not by the taxpayer in his residential office but by his Association in Seattle. (I-R. 28; II-R. 23, 25, 30, 49-54.) Indeed, whereas Hulme, operating

²³ Presumably, however, the taxpayers in *Heuer* and *Steinhort* carried on their hydrographic studies somewhere, possibly at their residences. (See II-R. 32-33.)

alone, had to be at his residential office to receive assignments—which could be requested at any time and often on short notice—taxpayer here did not have to be at his residence to receive work; it was sufficient that he get in contact with the Association wherever he happened to be. (II-R. 50-51, 56.) Further, while the taxpayer here testified (II-R. 26) that approximately fifty percent of his work was performed at the central Seattle waterfront²⁴—an area covering a distance of only three and one-half or four miles (I-R. 29), at issue in *Hulme* was seventy-three percent of the taxpayer's expenses incurred in traveling to and from such widely separated ports as Redwood City, San Francisco, Martinez, and Stockton, and approximately eighty percent of the assignments performed by the taxpayer were apparently spread out over the Stockton-San Francisco port areas. Under the circumstances in that case, then—where, unlike the instant case, expenses for travel to widely separated ports were at issue and the taxpayer, not belonging to a pilot's association, arguably had his business headquarters at his residence—the court may have concluded that no one city or port area constituted the taxpayer's principal place of business. But, in the instant case, essentially the taxpayer only studied at his residential office because the Association, for the benefit of its members,

²⁴ See also fns. 15 and 16, *supra*, and accompanying text.

carried on the necessary commercial aspects of the pilotage business at its Seattle office, and taxpayer performed approximately fifty percent of his assignments at Seattle, where he derived all of his income from the Association. *Hulme*, then, is distinguishable from the instant case²⁵.

The cases relied on by taxpayer (Br. 13-14) other than *Hulme*, discussed *supra*, are distinguishable on their facts from the instant case. *Rice v. Riddell*, 179 F. Supp. 576 (S. D. Calif., 1959), involved a musician who had to carry his large musical instruments with him to constantly changing and temporary places of assignment (see Rev. Rul. 63-100, 1963-1 Cum. Bull. 34); unlike the taxpayer here, he had no established principal place of business. *Crowther v. Commissioner*, 269 F. 2d 292 (C.A. 9th, 1959), and *Mathews v. Commissioner*, 310 F. 2d 98 (C.A. 9th, 1962), involving remote, uninhabitable and temporary job locations, are distinguishable for much the same reason as is the *Rice* case, *supra*.

Taxpayer's suggestion (Br. 21-22; see also Br. 14-15) that there is a "conflict" between this Court's decisions in *Crowther* and *Mathews*, *supra*, and those of the Fifth Circuit in *Heuer* and *Steinhort*, *supra*, is

²⁵ If, however, this Court should not consider *Hulme* distinguishable, then we contend that it was wrongly decided and that this Court should disregard it and follow the well-reasoned opinion of the Fifth Circuit in *Steinhort*, which approved its prior decision in *Heuer*.

without merit. In *Heuer*, the Fifth Circuit was undoubtedly aware of the *Crowther* decision; in *Steinhort* (335 F. 2d, pp. 504-505) the court cited both *Crowther* and *Mathews* with apparent approval, noting that it agreed with this Court's definition of (Section 162(a) (2)) "home" in those cases, and held that expenses incurred in commuting between "home", as there defined, and the taxpayer's established place of business—a common expense incurred by many taxpayers regardless of their particular occupations without tax deduction therefor—were non-deductible personal expenses. The Fifth Circuit in *Steinhort* pointed out that the well-established rule that such commuting expenses are not deductible tended to achieve equality of treatment among similarly situated taxpayers (335 F. 2d, p. 503) a fundamental goal of our system of taxation. *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 185-186 (1957)²⁶. As stated in *Steinhort*,

²⁶ Congress in 1958 emphasized that equality of treatment of similarly situated taxpayers is a basic objective in the context of business-related travel expenses. In that year, Congress repealed Section 120 of the 1954 Code (see Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, Sec. 3), which had allowed state police to exclude from their income \$5 daily meal allowances. The Senate Finance Committee gave as one of its reasons (S. Rep. No. 1983, 85th Cong., 2d Sess., P. 14 (1958-3 Cum. Bull. 922, 935)):

* * * this exclusion is inequitable because there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Subsistence expense incurred by taxpayers generally in the performance of services as employees while away from home are deductible * * *.

To bring the tax treatment of subsistence allowances for police officials in line with the treatment of such allowances in the case of other taxpayers, your committee's bill * * * repeals the section of present law providing this \$5 exclusion.

supra, involving facts virtually identical to those here (335 F. 2d, p. 503):

Deeply ingrained in the whole tax structure—memorialized now by literally hundreds of tax rulings, Tax and other Court decisions * * * is the basic proposition that the cost of going to and from home and an established place of business is a non-deductible personal expenditure.

* * * its predominant * * * grace is a sort of rough equality among all the millions of taxpaying, income-earning Americans who go—not as in scriptural days down to the sea in ships—but who go to and from their homes and their place of work.

In conclusion, taxpayer has failed to show that the District Court's rejection of his residential office as his principal place of business was clearly erroneous. Rather, it was Seattle where taxpayer performed a substantial portion—approximately fifty percent—of his assignments as a pilot, where he derived virtually all of his income, and where the Pilots Association, for the benefit of its members, carried on virtually all of the commercial aspects of the pilotage business. Taxpayer, for personal reasons, chose to maintain his residence away from Seattle, his principal place of business. Accordingly, the commuting costs incurred by taxpayer on his trips to and from Seattle were non-deductible personal expenses.

CONCLUSION

For the reasons stated above, the judgment of the District Court is correct and should be affirmed.

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OCTOBER, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated:..... day of....., 1967.

United States Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 62 ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and business deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and business deductions of employees.*—

(C) *Transportation . . . expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

*

*

*

(26 U.S.C. 1964 ed., Sec. 62.)

SEC. 162. TRADE OR BUSINESS EXPENSES

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * *

(26 U.S.C. 1964 ed., Sec. 162.)

SEC. 262. PERSONAL, LIVING AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

Treasury Regulations on Income Tax (1954 Code) :

§ 1.62-1 *Adjusted gross income.*

* * *

(g) Transportation expenses paid or incurred by an employee in connection with performance by him of services for his employer are deductible from gross income under part VI in computing adjusted gross income. "Transportation", as used in section 62 (2) (C), is a narrower concept than "travel", as used in section 62 (2) (B), and does not include meals and lodging. The term "transportation expense" includes only the cost of transporting the employee from one place to another in the course of his employment, while he is not away from home in a travel status. Thus, transportation costs may include cab fares, bus fares, and the like, and also a pro rata share of the employee's expenses of operating his automobile, including gas, oil, and depreciation. All transportation expenses must be allowable ex-

penses under part VI (section 161 and following), subchapter B, chapter 1 of the Code, as ordinary and necessary expenses incurred during the taxable year in carrying on a trade or business as an employee. Transportation expenses do not include the cost of commuting to and from work; this cost constitutes a personal, living, or family expense and is not deductible. (See section 262.)

* * *

(26 C.F.R., Sec. 1.62.1.)

§ 1.162-2 *Traveling expenses.*

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * *

(26 C.F.R., Sec. 1.162-2.)

§ 1.262-1 *Personal, living, and family expenses.*

* * *

(a) *In general.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:

* * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other transportation expenses are not deductible unless they qualify as expenses deductible under section 162, * * *

* * *

(26 C.F.R., Sec. 1.262-1.)

Nos. 22034, 22034 A-D

**United States
Court of Appeals**
For the Ninth Circuit

N. B. GIUSTINA and EHRMAN GIUSTINA,
as Co-Executors of the Estate of
ERMINIO GIUSTINA, Deceased, and
IRENE GIUSTINA, et al.
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appellants' Brief

On Appeal from the United States District
Court for the District of Oregon

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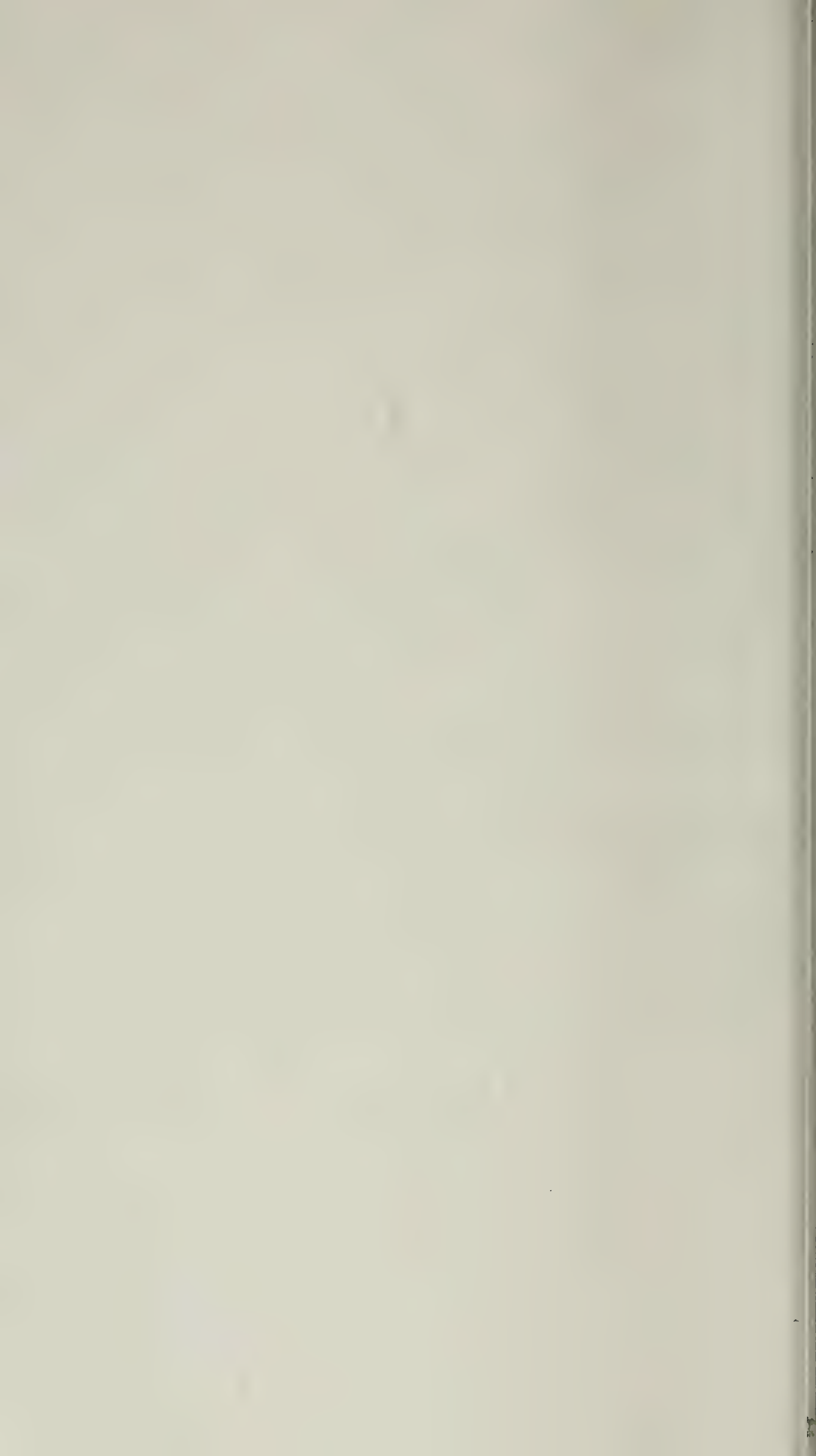
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JURISDICTION

These are income tax refund cases. As appears in more detail in the statement of the case below, the District Court had jurisdiction under Title 28, U.S. Code, Section 1346, and this Court has jurisdiction of the appeals under Title 28, U. S. Code, Section 1291.

OPINION BELOW

The opinion of the District Court was handed down by Judge John F. Kilkenny. He found for Appellee. The opinion is reported at 267 F. Supp. 40.

CONSOLIDATION

These civil actions all involve the same items of law and fact (except for the amounts requested refunded); all of said civil actions were consolidated for consideration in the District Court, and are covered by the same opinion. Accordingly, appellants moved this Court for limited consolidation of all of said civil actions with respect to record, briefing and argument.

STATUTES INVOLVED

1954 Internal Revenue Code, Section 164 (a):

“(a) General Rule.—Except as otherwise provided in this section, there shall be allowed as a deduction taxes paid or accrued within the taxable year.”

1954 Internal Revenue Code, Section 631 (b):

“(b) Disposal of Timber With a Retained Economic Interest.—In the case of the disposal of timber held for more than 6 months before such disposal, by the owner thereof under any form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from disposal of such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber. * * * ”

1954 Internal Revenue Code, Section 1231 (a):

“(a) General Rule.—If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business * * * exceed the recognized losses

* * * such gains shall be considered as gains * * * from sales or exchanges of capital assets held for more than 6 months. * * *

1954 Internal Revenue Code, Section 1231 (b) (2):

“(b) (2) Definition of Property Used in the Trade or Business.—For the purposes of this section * * *

“(2) Timber, Coal or Domestic Iron Ore.—Such terms includes timber, coal and iron ore with respect to which Section 631 applies.”

QUESTION PRESENTED

Whether under the circumstances here the partnership (consisting of the appellants herein) which granted to the corporation the right to cut and remove timber from certain timber tracts owned by the partnership was entitled to capital gains treatment on amounts received from the corporation to the extent that these amounts represented real property taxes paid by the corporation on all timber lands covered by the timber-cutting contract.

STATEMENT OF THE CASE

Giustina Brothers partnership (sometimes referred to as “the partnership”), consisting of the individual appellants herein, was organized on April 1, 1947.

On July 1, 1948 the partnership entered into a contract with Giustina Brothers Lumber Company (sometimes referred to as “the corporation”) an Oregon corporation controlled by the partners during the years in

suit, but not at the time the contract was made. At the time of entering into the contract, the partners collectively owned approximately 45 per cent of the stock of the corporation. A copy of this contract appears as Exhibit A, R. pp. 26 et seq.

This contract was later modified by a supplementary agreement entered into on April 1, 1957 between the partnership and Giustina Brothers Lumber Company. A copy of this supplementary agreement appears as Exhibit B, R. pp. 46 et seq.

The contract provided for the sale by the partnership to the corporation of certain standing timber, said timber to be cut and removed by the corporation.

The corporation, in addition to other considerations to be paid for the timber, agreed to pay the real property taxes on all timber lands covered by the contract.

In actual practice, the partnership paid the taxes and then received reimbursement from the corporation.

The partnership claimed a deduction from ordinary income for the real property taxes paid by it for the taxable years here involved.

When the partnership was reimbursed by the corporation for the real property taxes paid by it, it treated such reimbursements as amounts realized from the disposal of timber and increased its capital gains realized from the disposal of timber.

The Commissioner of Internal Revenue determined that the reimbursements received were not amounts realized from the disposal of timber within the meaning of §631(b), Internal Revenue Code of 1954, and treated the reimbursements as ordinary income.

These adjustments gave rise to deficiencies which were assessed against the individual plaintiffs. These deficiencies were paid, together with interest, and timely claims for refund were filed by the individual plaintiffs. These claims were rejected by statutory notices of disallowance, and the instant actions were timely brought.

SPECIFICATION OF ERROR

The lower Court erred in not allowing the partners as sellers to treat as a part of the selling price payment of liens for property taxes against the timber involved, which tax liens were paid pursuant to the contract by the corporate buyer.

ARGUMENT

Under the contract of 1948 (R., pp. 26 et seq.) and under the supplemental contract of 1957 (R., pp. 46 et seq.) the members of the partnership as sellers and the corporation as buyer agreed to purchase a very substantial amount of timber from the sellers' lands, to-wit: 150,000,000 board feet of merchantable timber situated on extensive parcels of land (R., pp. 26 and 42 et seq.).

As part of the sales and purchase price the corporate buyer agreed to pay the real property taxes which ac-

crued as liens up to the time that the buyer had completed logging the particular parcel involved (R., pp. 26 and 28 et seq). The buyer had the option of selecting the particular parcel or parcels to be logged. It was only reasonable, prudent and the crystal-clear intent of the parties that the buyer should remove the tax liens from the property involved which by reason of the contract the sellers were restrained from selling to any other party and which the buyer could log immediately or after some years.

Upon the facts and the statutes this is a somewhat unique case, and no decision directly and entirely in point has been found. However, tax consequences are determined by economic realities, and both the intent of the parties and the statutes are clear that as to the sellers the payments of the tax liens charged to the buyer were a part of the consideration received for capital gain purposes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial Court should be reversed and the refunds allowed.

Respectfully submitted,

WILLIAM E. DOUGHERTY
Attorney for Appellants

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

/s/WILLIAM E. DOUGHERTY

WILLIAM E. DOUGHERTY,
Attorney for Appellants.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have made service of the foregoing brief, together with the attached certificate, on the appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the — day of ———, 1967, a duly certified, true, exact and full copy thereof, enclosed in an envelope with postage prepaid addressed to Sidney I. Lezak, United States Attorney, United States Courthouse, Portland, Oregon, 97207, and by depositing a like copy in a like envelope addressed to G. Ben-Horin, Tax Division, Department of Justice, Washington, D.C. 20530, attorneys for appellee.

/s/WILLIAM E. DOUGHERTY

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